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APPENDIX

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

— 72-782

NO. ~~XXXX~~

GATEWAY COAL COMPANY, Petitioner,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition for a Writ of Certiorari Filed November 28, 1972
Certiorari Granted February 26, 1973

APPENDIX

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1972

NO. 72-872

**GATEWAY COAL COMPANY, Petitioner,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.**

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Petition for a Writ of Certiorari Filed November 28, 1972
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APPENDIX

Chronological List of Relevant Docket Entries

June 16, 1971 — Plaintiff Gateway Coal Company's Complaint filed in the United States District Court for the Western District of Pennsylvania.

June 18, 1971 — Hearing on temporary restraining order and Order enjoining work stoppage and ordering arbitration with suspension of two assistant line foremen.

June 23, 1971 — Hearing on preliminary injunction and order of court continuing the Order of June 18, 1971.

June 28, 1971 — Memorandum and Order of court converting the temporary restraining order of June 18, 1971, into a preliminary injunction filed.

July 6, 1971 — Answer and Counterclaim of Local Union No. 6330, United Mine Workers of America, filed.

July 16, 1971 — Notice of Appeal by defendants, United Mine Workers of America and District 4, United Mine Workers of America, filed.

July 20, 1971 — Answer to counterclaim of Local Union No. 6330, United Mine Workers of America, filed by plaintiff.

August 30, 1971 — Notice of Appeal received July 20, 1971 by defendant Local Union No. 6330, United Mine Workers of America, filed.

September 2, 1971 — Umpire Decision and Award rendered.

October 27, 1971 — Order of the District Court, dated October 26, 1971, denying motion of Local Union

Relevant Docket Entries.

No. 6330, United Mine Workers of America, to stay Order of June 28, 1971 or in the alternative to increase injunction bond, filed.

November 9, 1971 — Order granting appellees' motion to consolidate appeals filed.

February 11, 1972 — Order of the Court of Appeals for the Third Circuit striking appellee's supplemental appendix filed.

July 18, 1972 — Opinion of the Court of Appeals for the Third Circuit with separate dissenting opinion by Rosenn, C.J., filed.

July 18, 1972 — Judgment of the Court of Appeals for the Third Circuit filed.

July 31, 1972 — Petition for Rehearing filed.

August 30, 1972 — Order denying Petition for Rehearing filed.

Complaint.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4, UNITED MINE WORKERS
OF AMERICA; LOCAL NO. 6330, UNITED
MINE WORKERS OF AMERICA,
Defendants.

Civil
Action
No. 71 587

Complaint

Gateway Coal Company complains of the Defendants as follows:

1. This Court has jurisdiction of this claim under Section 301 of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. Section 185.

2. Plaintiff, Gateway Coal Company, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania. Through its Gateway Mine located in Greene County, Pennsylvania, Plaintiff is engaged in the mining of coal which is used in the production of steel and coal chemicals within the Western District of Pennsylvania and is engaged in an industry affecting commerce as defined in the Labor-Management Relations Act, 1947.

3. Defendant, United Mine Workers of America, is an unincorporated labor organization having its principal office at 900 Fifteenth Street, N. W., Washington, D. C. Its duly authorized officers or agents are engaged

Complaint.

in representing or acting for certain employees of the Plaintiff (hereinafter referred to as "employee-members") within the Western District of Pennsylvania for the purpose of collective bargaining.

4. Defendant, District No. 4, United Mine Workers of America, is an unincorporated labor organization and an administrative division of the United Mine Workers of America having an office in the Gallatin National Bank Building, Uniontown, Pennsylvania, within the Western District of Pennsylvania and is engaged in representing and acting for employee-members at Plaintiff's Gateway Mine (hereinafter referred to as "Gateway") located at Clarksville, Greene County, Pennsylvania, for the purpose of collective bargaining.

5. Defendant, United Mine Workers of America, Local No. 6330, is an unincorporated labor organization, and is a local labor union of Defendant, United Mine Workers of America. Local Union No. 6330 maintains its office in care of Raymond Rohrer, Recording Secretary, Box 470, Clarksville, Greene County, Pennsylvania, and is engaged in representing and acting for employee-members at Gateway for the purpose of collective bargaining.

6. For many years Defendants, United Mine Workers of America, District No. 4 United Mine Workers of America and United Mine Workers of America Local No. 6330 have represented the maintenance and production employees of Plaintiff at Gateway for purposes of collective bargaining and have entered into labor agreements covering wages, hours and other conditions of employment for the approximately 580 employees employed by Plaintiff at Gateway.

Complaint.

7. The collective bargaining agreement between the Plaintiff and the Defendants covering said production and maintenance employees is the National Bituminous Coal Wage Agreement of 1968 which became effective on October 1, 1968, and by its terms, continues in full force and effect until September 30, 1971.

8. The 1968 Labor Agreement contains a detailed grievance procedure and an arbitration provision reading as follows:

"SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

"Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately. (The parties will not be represented by legal counsel at any of the steps below.)

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the mine committee.

"3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

Complaint.

"5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

9. The 1968 Labor Agreement provides for compulsory, final and binding arbitration of "... differences between the Mine Workers and the operators as to the meaning and application of the provisions of [said] agreement ..." and "... differences ... about matters not specifically mentioned in [said] agreement ..." and "... any local trouble of any kind [arising] at the mine ..." The provisions of said collective bargaining agreement clearly entitle the Plaintiff to an injunction under the provisions of Section 301 of the Labor-Management Relations Act, 1947, to enforce the Defendants' contractual duty, which duty is also binding on the Plaintiff, to submit "differences" and "local trouble of any kind" to terminal arbitration and to require the Defendants to refrain from striking over them.

Complaint.

10. Since June 1, 1971, at or about 12:01 a.m., Defendants, United Mine Workers of America, District No. 4, United Mine Workers of America, United Mine Workers of America Local No. 6330 through their employee-members, in violation of the 1968 Labor Agreement, have engaged in an illegal work stoppage in that employee-members of said Defendants had refused to report for work at Gateway as scheduled. The work stoppage is continuing. The employee-members of Defendants have notified Plaintiff that the illegal work stoppage occurred because the Defendant Local No. 6330 had passed a resolution that its employee-members would not work with certain Assistant Mine Foremen designated and assigned by the Plaintiff to act as Supervisors at Gateway.

11. Notwithstanding the provisions of the 1968 Labor Agreement requiring Defendants to follow the grievance procedure for the settlement of local disputes, Defendants have failed and refused, and still fail and refuse, to honor their contract commitments.

12. Plaintiff has advised Defendants, their officers and their employee-members of its willingness to submit the dispute giving rise to the illegal work stoppage to immediate arbitration, but Defendants have refused to arbitrate the dispute, in violation of their obligations under the 1968 Labor Agreement.

13. As a result of the continuing illegal work stoppage, Plaintiff has been deprived of the use, benefit and production of the Gateway Mine, resulting in the daily loss of in excess of 8,500 tons of washed coal.

14. In addition, Plaintiff is threatened with an enormous loss because the continuation of this illegal

Complaint.

work stoppage could in time force a curtailment of production in Plaintiff's coke, chemical, iron and steelmaking in Ohio and Pennsylvania. This illegal work stoppage could result in unemployment of steelworkers and extensive monetary losses.

15. Plaintiff has suffered and will continue to suffer, immediate and irreparable harm and injury. Plaintiff has no adequate remedy at law for Defendants' refusal to utilize the procedures to which the parties agreed for the settlement or resolution of local and district disputes in the 1968 Labor Agreement, and greater injury will be inflicted upon Plaintiff by the denial of an injunction than upon Defendants by the granting of such relief.

WHEREFORE, Plaintiff prays:

1. That a Temporary Restraining Order be issued forthwith, and that after hearing a Preliminary Injunction be issued, to be made permanent on final hearing, enjoining Defendants, their officers, representatives, and members, and all persons acting in concert with Defendants, or on their behalf, from:

(a) Engaging, or continuing to engage, in a strike or work stoppage at Plaintiff's Gateway Mine located in Greene County, Pennsylvania;

(b) Picketing, or in any other manner interfering with the orderly resumption of, or continuation of, operations at Plaintiff's Gateway Mine, located in Greene County, Pennsylvania.

2. That Defendants, District No. 4, United Mine Workers of America, and Local No. 6330, their officers, representatives, members, and Plaintiff, be directed and required to utilize the "Settlement of Local and District

Complaint.

Disputes" provision on page 14 of the National Bituminous Coal Wage Agreement of 1968 for the settlement of any differences at Plaintiff's Gateway Mine, located in Greene County, Pennsylvania.

3. That Defendants' officers and representatives be directed to take all action which may be necessary to assure compliance with the terms of the 1968 Labor Agreement, and to bring an immediate end to the work stoppage and strike at Plaintiff's Gateway Mine, located in Greene County, Pennsylvania.

4. That compensatory damages be awarded to Plaintiff against Defendants in such amount as the Court shall determine to be due and owing.

5. That Plaintiff be awarded such other and further relief as the Court may deem just and which Plaintiff may request.

LEONARD L. SCHEINHOLTZ

HENRY J. WALLACE, JR.

REED SMITH SHAW & McCLAY

747 Union Trust Building

Pittsburgh, Pennsylvania 15219

Counsel for Plaintiff,

Gateway Coal Company

Of Counsel:

DANIEL R. MINNICK

Coal Wage Agreement of 1968.

National Bituminous Coal Wage Agreement of 1968

EFFECTIVE OCTOBER 1, 1968

(Plaintiff's Exhibit No. 1; R. 12, 185-211)

(*Relevant Excerpts*)

* * * * *

MINE SAFETY PROGRAM

(a) *Mine Safety Code*

The Federal Mine Safety Codes for Bituminous Coal and Lignite Mines of the United States, Part I—underground mines and Part II—strip mines, promulgated and approved October 8, 1953, by the Secretary of the Interior are hereby adopted and incorporated by reference in this contract as a code for health and safety in bituminous and lignite mines of the parties of the first part.

(b) *Enforcement*

(1) Reports of the federal coal mine inspectors: Whenever inspectors of the United States Bureau of Mines, in making their inspections in accordance with authority as provided in Public Law 49 and Public Law 552 find there are violations of the Federal Mine Safety Code and make recommendations for the elimination of such noncompliance, the operators shall promptly comply with such recommendations, except as modified in paragraph two of this subsection.

(2) Whenever either party to the contract feels that compliance with the recommendations of the federal mine inspectors as provided above would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Industry Safety Committee as hereinafter provided.

Coal Wage Agreement of 1968.

(c) Review and Revision

In order to carry out the intent and purposes of the agreement affecting the Federal Mine Safety Code it is agreed that representatives of the United Mine Workers of America and the coal operators signatory hereto shall hold joint consultations with the United States Bureau of Mines looking toward review and appropriate revision of the Federal Mine Safety Code. Any revised code that is agreed upon between the aforementioned parties, when adopted by the parties, shall be adopted and incorporated by reference into this agreement in place of the code adopted and incorporated in the National Bituminous Coal Wage Agreement of 1950 and continued under this agreement.

(d) Joint Industry Safety Committee

There is hereby established under this agreement a Joint Industry Safety Committee composed of four members, two of whom will be appointed by the Mine Workers and two of whom will be appointed by the operators, whose duty it shall be to (1) arbitrate any appeal which is filed with it by any operator or any mine worker who feels that any reported violations of the code and recommendation of compliance by a federal coal mine inspector has not been justly reported or that the action required of him to correct the violation would subject him to irreparable damage or great injustice; and (2) to consult with the United States Bureau of Mines in accordance with the provisions of Section (c) above.

*Coal Wage Agreement of 1968.**(e) Mine Safety Committee*

At each mine there shall be a mine safety committee selected by the local union. The committee members while engaged in the performance of their duties, with the following exception, shall be paid by the local union. When the mine safety committee is making an investigation of an explosion and/or a disaster, they shall be paid by the company at their regular rate of pay for the hours spent making such investigation, provided there is not a more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation law of the state where such duties are performed.

The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

Coal Wage Agreement of 1968.

The safety committee and operators shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the agreement as may be required, and copies of all reports made by the safety committee shall be filed with the operators.

(f) The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this agreement at any mine or operation provided it shall give reasonable notice to the coal company.

* * * * *

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the mine committee.

3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and

Coal Wage Agreement of 1968.

two by the operators. Neither the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the operator or operators affected and by the Mine Workers. -

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

* * * * *

MISCELLANEOUS

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them whether national, district, local or otherwise providing

Coal Wage Agreement of 1968.

for a protective wage clause and a modification of this agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.

4. Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the president of the local union at the mine by the 18th day of each month that said operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month.

* * * * *

INTEGRATED INSTRUMENT

This agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after October 1, 1968.

* * * * *

Plaintiffs Exhibit No. 2.

Plaintiffs Exhibit No. 2

(R. 20, 212)

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES**

**Towne House Apartments
660 Boas Street
Harrisburg, Pennsylvania 17102**

May 26, 1971

**Mr. Joe Kreon, President
Chartiers Local No. 6330
United Mine Workers of America
Box 225
Clarksville, Pennsylvania 15322**

Dear Mr. Kreon:

This will acknowledge receipt of a copy of a letter dated April 30, 1971 signed by Thomas O'Brochta, John Ozonish and Frank Rutherford of the Safety Committee of Local 6330, United Mine Workers of America.

This letter involves an incident at the Gateway Mine of the Gateway Coal Company. Mine Inspector J. M. Hovanic of the 8th Bituminous District had, of course, previously reported this incident to me and I had discussed it with Deputy Secretary Dennis Keenan. Due to the information I have obtained and open discussions concerning this matter with Assistant Attorney General, Peter J. Dubinsky, I concur that the action taken by Mr. Hovanic to file information with the District Magistrate against Mr. Debreczeni, Mr. Masolovich and Mr. Bartosheck.

In view of the satisfactory record and good performance of these foreman in the past and the pending

Plaintiffs Exhibit No. 2.

legal action, we feel that no further action should be taken in this matter. The coal company is at liberty to return the three (3) assistant foreman to work if it so desires.

The objectives of the mining laws of this State is to enhance and assure mine safety. The penalty language in the Bituminous Mining Law was meant to penalize violators of the mining law to the extent deemed appropriate by the judiciary. Other than the above noted action on the part of our District Inspector and the penalty imposed by the magistrate, we feel that sufficient action has been taken by the Commonwealth in this case.

Yours truly,

DAVID R. MANEVAL

Acting Deputy Secretary

DRM/des

cc: Honorable Peter J. Dubinsky
Honorable Dennis J. Keenan
Mr. William Kegel

Plaintiffs Exhibit No. 6.

Plaintiffs Exhibit No. 6

(R. 34, 217-218)

**GATEWAY COAL COMPANY
3 GATEWAY CENTER
PITTSBURGH, PA. 15230**

June 8, 1971

**Mr. James W. Kelly, President
District 4, United Mine Workers
Gallatin National Bank Building
Uniontown, Pennsylvania**

Dear Mr. Kelly:

We have read with interest the statement attributed to you in the Uniontown Morning Herald, which quotes you as saying:

"Let Management join hands with us to provide safety first and production afterwards."

You are also quoted as saying that the work stoppage at Gateway Mine will be "resolved when management decides to keep the foremen off the job and leave the case be handled through the courts."

These statements, if correctly quoted, lead us to believe that we can come quickly to agreement on the main issue and end this work stoppage which is needlessly costing both our employees and the company.

We agree with your thought that management and the union should "join hands to provide safety first and production afterwards."

I hope we can agree that management's actions during the incident of April 15 demonstrated our commitment to this philosophy.

Plaintiffs Exhibit No. 6.

1. At the first indication of reduced airflow, an assistant foreman sought out the cause, called for assistance and pulled the power on his section.
2. Additional men were sent in to help locate the problem.
3. As soon as it was determined that more than a "stopping" was involved, the power was pulled throughout the mine and all men were ordered out of the mine.
4. All this was done even though the airflow throughout the mine was at all times above State and Federal standards and methane gas levels were well within acceptable levels.
5. The men were asked to return to work only after repairs had been made and the airflow carefully tested. Those who followed instructions and waited for a return to work were paid for a full shift.

These actions demonstrate Management's commitment to "provide safety first and production afterwards."

In the interest of ending this work stoppage, we are also willing to agree that the case should be handled through the courts.

Arbitration is the "court" provided in the contract between the company and the United Mine Workers for settlement of issues such as these. Why don't we use it?

At this time, we are willing to submit to final impartial arbitration the question of whether the mine is

Plaintiffs Exhibit No. 6.

made unsafe by the presence of these assistant foremen in the mine.

If the miners of Local 6330 will return to work immediately, we would be willing to bypass normal grievance procedures and submit the question to the panel board which is already formed to hear the grievance on reporting pay.

I cannot believe that either you, or the United Mine Workers union or the individual miners are refusing to work in a deliberate attempt to destroy the careers of two assistant foremen who only recently were rank- and-file miners like your members.

Let us agree that we are all interested primarily in having a safe mine, accept the fact that the specific issue of whether the assistant foremen accurately recorded airflow levels will be decided through the legal proceedings now filed, and seek a prompt decision on the question on which we cannot agree through arbitration.

What could be more fair — to the individual miners, the foremen, and the company?

Yours very truly,

WILLIAM G. KEGEL

President

Gateway Coal Company

Order of the District Court.

Order of the District Court, Filed June 18, 1971
*(Printed in the Appendix to the Petition for Certiorari
at pages 1a through 4a)*

Order of the District Court.

**Order of the United States District Court for The
Western District of Pennsylvania dated
June 23, 1971 (R. 183-184).**

(Title Omitted in Printing)

Order

And now, this 23rd day of June, 1971, after consideration of the arguments of counsel, the order made June the 18th, 1971, at the proceedings captioned Gateway Coal Company versus United Mine Workers of America; District No. 4, United Mine Workers of America; and Local 6330, United Mine Workers of America at 71-567, is continued in full force and effect and will be continued until this Court has had an opportunity to act upon the application for a preliminary injunction heretofore presented and upon which application we have heard argument this day. The Court requires some short period of time to consider the arguments and the authorities presented and to consider the application heretofore made for preliminary injunction. It is understood that the temporary restraining order of June the 18th, 1971, will continue in full force and effect meanwhile. However, the Court will not delay more than five days the decision on the request for a preliminary injunction.

HON. BARRON P. MCCUNE

Memorandum and Order of District Court.

**Memorandum and Order of District Court,
Filed June 28, 1971**

***(Printed in the Appendix to the Petition for Certiorari
at pages 5a through 10a)***

24a

Answer and Counterclaim of Local Union No. 6330.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GATEWAY COAL COMPANY, Plaintiff,

v.

**UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4, UNITED MINE WORKERS
OF AMERICA; LOCAL NO. 6330, UNITED
MINE WORKERS OF AMERICA,
Defendants.**

**Civil Action
No. 71-567**

**Answer and Counterclaim of Local Union No. 6330,
United Mine Workers of America**

ANSWER

1. Defendant herein, Local Union No. 6330, denies paragraph 1 of the complaint.

2. Said defendant admits that the Gateway Coal Company operates the Gateway Mine in Southwestern Pennsylvania. Defendant herein is without sufficient knowledge to admit or deny the remaining allegations contained in paragraph 2 of the complaint.

3. Said defendant admits that the United Mine Workers of America is an unincorporated labor organization having its principal office at 900 Fifteenth Street, N.W., Washington, D.C. The remaining allegations in paragraph 3 of the complaint are denied.

4. Said defendant admits that District 4, UMWA is an unincorporated labor organization having an office in the Gallatin National Bank Building, Uniontown, Pennsylvania. Defendant further admits that District 4, through its officers, agents and employees has ap-

Answer and Counterclaim of Local Union No. 6330.

parent authority to act on behalf of the UMWA members employed at the Gateway Mine. All other allegations of paragraph 4 of the complaint are denied.

5. The allegations of paragraph 5 of the complaint are admitted.

6. Said defendant admits that Local 6330 has for many years represented the production and maintenance employees at the Gateway Mine. Defendant specifically denies that Local 6330 or its members have ever entered into or ratified any collective bargaining agreement and that it or its members are parties to any existing collective bargaining agreement. The remaining allegations in paragraph 6 of the complaint are denied.

7. Said defendant admits that a document known as the National Bituminous Coal Wage Agreement of 1968 became effective on October 1, 1968, and is effective until September 30, 1971. It is specifically denied that Local 6330 or its members are parties to this agreement. The remaining allegations of paragraph 7 are denied.

8. Said defendant admits that the quoted portions of the National Bituminous Wage Agreement of 1968 are true and correct. The introductory allegations in paragraph 8 of the complaint are denied.

9. The allegations contained in paragraph 9 of the complaint are denied. Specifically, the quotations taken out of the text and the legal conclusions stated therein are denied.

10. Said defendant admits that a work stoppage began at the Gateway Mine on or about 12:01 a.m., June 1, 1971, and continued until the time the complaint herein was filed. Defendant specifically denies that it or any of its co-defendants engaged in any illegal activity what-

Answer and Counterclaim of Local Union No. 6330.

soever, including any breaches of any collective bargaining agreements. Defendant admits that Local Union 6330 passed a resolution to the effect that its members would not work with certain Assistant Mine Foremen who had been suspended by plaintiff because said foremen would render the Gateway Mine abnormally dangerous. Defendant admits that plaintiff was aware of the passage of this motion. The remaining allegations of paragraph 10 of the complaint are denied.

11. Said defendant specifically denies that the dispute herein is subject to the contract grievance procedure and that this defendant, or any of its co-defendants, has refused to honor any contract commitments.

12. Said defendant specifically denies that the dispute giving rise to the work stoppage is arbitrable and that the work stoppage was illegal. The remaining allegations in paragraph 12 of the complaint are denied.

13. Said defendant specifically denies that it or any of its co-defendants is responsible for any work stoppage, that plaintiff has lost its production as a result of the conduct of any of the defendants and that the daily production at the Gateway Mine is 8,500 tons. The remaining allegations in paragraph 13 of the complaint are denied.

14. Defendant specifically denies that plaintiff is threatened with any enormous loss, whether monetary or otherwise, that plaintiff is engaged in any business other than coal mining, that plaintiff is engaged in coke, chemical, iron and steelmaking, and that the work stoppage could result in unemployment of any steelworkers or any monetary losses. The remaining allegations in paragraph 14 of the complaint are denied.

Answer and Counterclaim of Local Union No. 6330.

15. Said defendant specifically denies that plaintiff has suffered or will suffer any harm or injury, irreparable or otherwise, that plaintiff has no adequate remedy at law or that plaintiff will suffer greater harm by the denial of injunctive relief than defendants, particularly Local Union 6330 and its members, will suffer if such relief is granted. The remaining allegations in paragraph 15 of the complaint are denied.

FIRST AFFIRMATIVE DEFENSE

The instant matter involves a labor dispute, and therefore, this Court lacks jurisdiction under the Norris-LaGuardia Act, 29 U.S.C.A. 101 *et seq.*, to grant injunctive relief.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief can be granted. The instant labor dispute arises out of a safety issue — which issue is not and never has been subject to the grievance procedure in the National Bituminous Wage Agreement of 1968 and its predecessor agreements.

THIRD AFFIRMATIVE DEFENSE

Defendant herein, Local Union 6330, and its members are not bound by the terms of the National Bituminous Wage Agreement of 1968 inasmuch as neither defendant nor its members ever ratified or adopted said agreement or even were given the opportunity to ratify or adopt said agreement.

FOURTH AFFIRMATIVE DEFENSE

In the alternative, even if Local Union 6330 and its members were and are bound by the terms of the 1968 collective bargaining agreement, said agreement con-

Answer and Counterclaim of Local Union No. 6330.

tains no "no strike" clause and such a clause may not be implied. Accordingly, the instant work stoppage is not in violation of the agreement.

FIFTH AFFIRMATIVE DEFENSE

The instant work stoppage arises out of safety conditions at plaintiff's mine. As provided by Section 502 of the Labor Management Relations Act, 29 U.S.C.A. 143, such a work stoppage cannot be considered a breach of any contract.

SIXTH AFFIRMATIVE DEFENSE

The instant dispute was settled by agreement between defendant District 4, UMWA and plaintiff's officials on April 18, 1971. Plaintiff, thereafter, breached that oral agreement.

COUNTERCLAIM

Count I

1. Defendant, Local Union No. 6330, United Mine Workers of America, is and has been for many years the collective bargaining agent for the production and maintenance employees employed at plaintiff's Gateway Mine.

2. Plaintiff, Gateway Coal Company, operates and has operated for several years the aforesaid Gateway Mine.

3. Plaintiff is a signatory, individually and through its bargaining representative, the Bituminous Coal Operators' Association, to labor agreements effective from April 2, 1964, through September 30, 1971, including the National Bituminous Wage Agreement of 1968, covering the Gateway Mine and the production and maintenance employees there employed.

Answer and Counterclaim of Local Union No. 6330.

4. This Court has jurisdiction of this counterclaim under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. 185.

5. Defendant Local Union 6330 and its members are third party donee beneficiaries of the various collective bargaining agreements entered into between plaintiff, individually and through its collective bargaining representative, the Bituminous Coal Operators' Association, and the United Mine Workers of America.

6. The various collective bargaining agreements provide explicitly that the operators will operate their mines in accordance with state and federal mining laws and implicitly that the operators, including the plaintiff herein, Gateway Coal Company, will provide their employees with safe places to work.

7. On or about April 18, 1971, plaintiff and representatives of the United Mine Workers of America entered into an oral agreement whereby the members of Local Union 6330 would continue to work at plaintiff's Gateway Mine and certain suspended assistant mine foremen would continue to be suspended from their jobs at the Gateway Mine, pending a resolution of criminal charges then on file or to be filed against the said assistant foremen by a state mine inspector.

8. Plaintiff, on or about June 1, 1971, informed UMW A officials and members of Local Union 6330 that it was returning the suspended foremen to work on the midnight shift.

9. By returning these particular foremen to active duty prior to the resolution of pending criminal proceedings against said foremen, plaintiff breached the

Answer and Counterclaim of Local Union No. 6330.

oral agreement it had entered into on or about April 18, 1971, with the UMWA, and furthermore breached its contractual obligation to provide its employees with safe places to work.

10. As a result of the aforesaid breaches of both the 1968 Bituminous Wage Agreement and the April 18, 1971 oral agreement, the members of Local Union 6330 were forced to withhold their services and the member-employees lost several hundred of thousands of dollars in wages they would otherwise have received.

Count II

1. Defendant herein, Local Union 6330, incorporates by reference paragraphs 1 through 10 of Count I of this counterclaim.

2. Plaintiff herein is and has been required by its collective bargaining agreements since June, 1965, to operate its Gateway Mine in accordance with federal and state mining laws and regulations promulgated by the state and federal bureau of mines. More recently, since March 28, 1970, plaintiff has been required to operate its Gateway Mine in compliance with the 1969 Federal Coal Mine Health and Safety Act, 30 U.S.C.A. 801. All of the foregoing federal coal mine safety acts are acts regulating commerce.

3. This Court has jurisdiction of this cause under 28 U.S.C.A. 1337, 19 U.S.C.A. 185, and 42 U.S.C.A. 1983.

4. Plaintiff herein, Gateway Coal Company, has repeatedly and flagrantly violated provisions of the aforesaid mine safety acts, which acts are incorporated by reference in its collective bargaining agreements;

Answer and Counterclaim of Local Union No. 6330.

consequently, such violations constitute breaches of its contractual obligations.

5. The aforesaid violations of law and breaches of contract have, prior to June 1, 1971, caused plaintiff's employees and the members of defendant, Local Union No. 6330, to lose thousands of shifts of work.

6. On information and belief, plaintiff will in the future continue to violate its statutory and contractual obligations, which will result in injury or death to the members of Local Union No. 6330, in addition to substantial losses of wages.

7. The members of defendant Local Union No. 6330 have been and will continue to be irreparably harmed by plaintiff's statutory violations and breaches of contract. Local Union 6330's remedy at law is inadequate to protect the lives, limbs and livelihoods of its members.

WHEREFORE, defendant Local Union 6330 prays for the following relief:

A. That an order be entered, following the presentation of evidence, dismissing plaintiff's complaint, or, in the alternative, that plaintiff's request for permanent injunctive relief and money damages as against Local Union No. 6330 be denied;

B. That an order be entered permanently enjoining the Gateway Coal Company from violating the 1969 Federal Coal Mine Health and Safety Act and its contractual duty to provide its employees with safe places to work;

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Answer and Counterclaim of Local Union No. 6330.

C. That judgment be entered awarding to Local Union No. 6330:

1. On behalf of its members, damages in the amount of \$350,000 in wages lost as a result of the June 1, 1971 work stoppages;
2. On behalf of the United Mine Workers Bituminous Health and Welfare Fund, damages in the amount of \$75,000 in royalty payments lost as a result of the June 1, 1971 work stoppages;
3. On behalf of its members and the aforesaid Health and Welfare Fund, damages for wages lost and royalty payments lost as a result of work stoppages since June 16, 1965, occasioned by plaintiff's breaches of contract and failure to provide its employees with safe places to work;

D. That Counsel for Local Union No. 6330 be granted reasonable attorneys' fees, costs and expenses:

1. To be paid by plaintiff or its bonding company pursuant to 29 U.S.C.A. 107, for resisting the imposition of injunctive relief or upon a determination that any injunctive relief granted was granted erroneously or improvidently; and
2. To be paid out of any fund to be created as a result of the affirmative relief sought in the counterclaim.

Answer and Counterclaim of Local Union No. 6330.

E. That the Court grant such other relief as it may deem appropriate.

LOCAL 6330 DEMANDS A TRIAL BY JURY.

Respectfully submitted,

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Answer by Plaintiff, Gateway Coal Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4, UNITED MINE WORKERS
OF AMERICA; LOCAL NO. 6330, UNITED
MINE WORKERS OF AMERICA,
Defendants.

Civil Action
No. 71-567

*Answer by Plaintiff, Gateway Coal Company,
to Counterclaim of Local Union No. 6330,
United Mine Workers of America*

Plaintiff, Gateway Coal Company, hereby files the following answer to the Counterclaim of Local Union No. 6330, United Mine Workers of America:

COUNT I

1. It is admitted that the Defendant, Local Union No. 6330, United Mine Workers of America, together with the United Mine Workers of America and District No. 4, United Mine Workers of America, are and for many years have been, the collective bargaining agent for the production and maintenance employees employed at Plaintiff's Gateway Mine.

2. The averments of Paragraph 2 are admitted.
3. The averments of Paragraph 3 are admitted.
4. The averments of Paragraph 4 are denied.
5. The averments of Paragraph 5 are denied.

Answer by Plaintiff, Gateway Coal Company.

6. The averments of Paragraph 6 are denied as stated. In further answer, the National Bituminous Wage Agreement of 1968 speaks for itself.

7. The averments of Paragraph 7 are denied.

8. It is admitted that on May 29, 1971, Plaintiff informed UMWA officials and officials of Local Union No. 6330 that it intended to return the suspended foremen to work on the midnight shift on June 1, 1971, pursuant to a directive from the State Bureau of Mines that the company was at liberty to return the two foremen to work, which directive was received from the State on May 29, 1971. Except to this extent, the averments of Paragraph 8 are denied.

9. The averments of Paragraph 9 are denied.

10. The averments of Paragraph 10 are denied.

COUNT II

1. Plaintiff incorporates by reference its Answer to Paragraphs 1 through 10 of Count I of the Counterclaim.

2. The averments of Paragraph 2 constitute conclusions of law which require no answer.

3. The averments of Paragraph 3 are denied.

4. The averments of Paragraph 4 are denied.

5. The averments of Paragraph 5 are denied.

6. The averments of Paragraph 6 are denied.

7. The averments of Paragraph 7 are denied.

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Answer by Plaintiff, Gateway Coal Company.

**WHEREFORE, Plaintiff, Gateway Coal Company,
prays for dismissal of the Counterclaim filed by Local
Union No. 6330, United Mine Workers of America.**

LEONARD L. SCHEINHOLTZ

HENRY J. WALLACE

REED SMITH SHAW & MCCLAY

747 Union Trust Building

Pittsburgh, Pennsylvania 15219

**Counsel for Plaintiff, Gateway
Coal Company**

Of Counsel:

DANIEL R. MINNICK

Umpire Decision and Award.

37a

Umpire Decision and Award, dated September 2, 1971
(Printed in the Appendix to the Petition for Certiorari
at pages 29a through 51a)

Order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1641, 71-1642 and 71-1786

GATEWAY COAL COMPANY

vs.

UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 4, UNITED MINE WORKERS OF
AMERICA; LOCAL No. 6330, UNITED MINE
WORKERS OF AMERICA

UNITED MINE WORKERS OF AMERICA,
DISTRICT No. 4, UNITED MINE WORKERS
OF AMERICA,

LOCAL UNION No. 6330,

Appt. in
71-1641

Appt. in
71-1642

Appt. in
71-1786

(D.C. Civil Action No. 71-567)

Present: KALONDER, HASTIE and ROSENN,
Circuit Judges.

Upon consideration of Motion of Local No. 6330 to
Strike Appellee's Brief and Supplemental Appendix,

It is ORDERED that appellee's supplemental appendix
be and hereby is stricken; and

It is Further ORDERED that motion of Local No.
6330 to strike appellee's brief be and hereby is denied.

By the Court,
KALODNER
Circuit Judge

Dated: February 11, 1972

Opinion of the Court of Appeals.

**Opinion of the Court of Appeals for the Third Circuit,
Filed July 18, 1972**

*(Printed in the Appendix to the Petition for Certiorari
at pages 12a through 24a)*

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Judgment of the Court of Appeals.

**Judgment of the Court of Appeals for the Third Circuit,
Filed July 18, 1972**

***(Printed in the Appendix to the Petition for Certiorari
at pages 25a through 26a)***

Order of the Court of Appeals.

**Order of the Court of Appeals for the Third Circuit
denying Petition for Rehearing**
*(Printed in the Appendix to the Petition for Certiorari
at pages 26a through 27a)*



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

NO. **72-782**

GATEWAY COAL COMPANY,
Petitioner

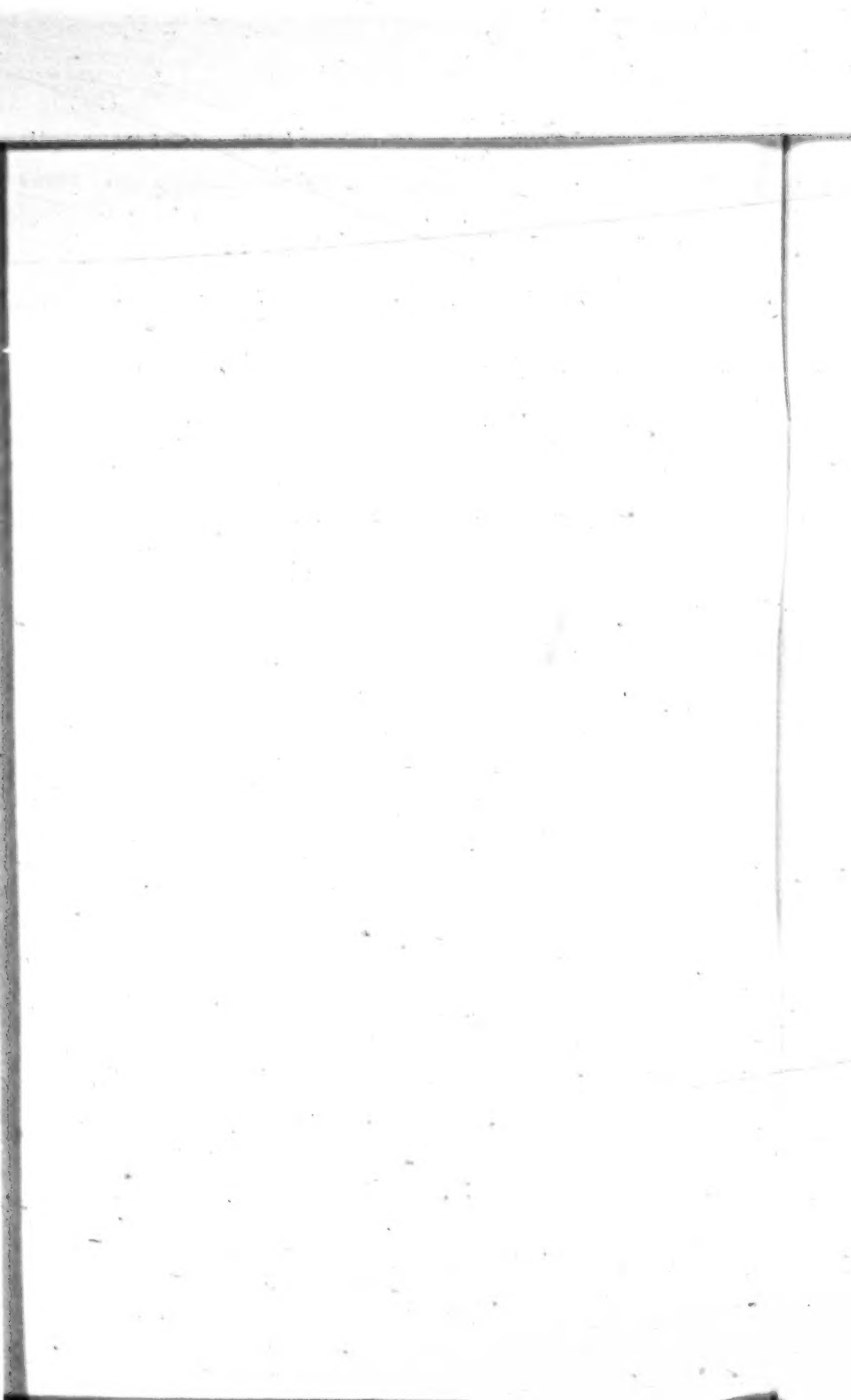
v.

UNITED MINE WORKERS OF AMERICA et al.,
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
and APPENDICES**

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Of Counsel:
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

GATEWAY COAL COMPANY,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA et al.,
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Gateway Coal Company, Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 18, 1972, rehearing denied August 31, 1972, in which the court reversed the District Court and vacated a preliminary injunction enjoining respondents¹ from continuing a work stoppage over an alleged safety dispute and ordering arbitration of the underlying dispute.

1. Respondents are individually designated in the caption of the opinion of the Court of Appeals set forth in Appendix C, *infra*, p. 11a.

Jurisdiction.**OPINIONS BELOW**

The temporary restraining order issued by the District Court for the Western District of Pennsylvania on June 18, 1972, is unreported (Appendix A, *infra*, pp. 1a-4a) as is the memorandum and order issued by the District Court on June 28, 1971, converting the temporary restraining order into a preliminary injunction (Appendix B, *infra*, pp. 5a-10a). The opinion of the United States Court of Appeals for the Third Circuit is reported at ____ F.2d ____, and was filed on July 18, 1972 (Appendix C, *infra*, pp. 12a-24a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1972 (Appendix D, *infra*, pp. 25a-26a). A petition for rehearing, timely filed, was denied on August 30, 1972 (Appendix E, *infra*, pp. 26a-27a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was by virtue of 29 U.S.C. §185.

Questions Presented.

QUESTIONS PRESENTED

1. Does the strong federal policy favoring arbitration of industrial disputes apply to safety disputes or is there a presumption that safety disputes are not arbitrable?

2. Does a federal court have authority under *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), to enjoin a strike over a safety dispute and order arbitration of the underlying dispute or is the *Boys Markets* decision limited to economic disputes not involving safety?

3. Where a union relies upon the "abnormally dangerous conditions" provision of Section 502 of the Labor-Management Relations Act as justification for a work stoppage, must it present ascertainable, objective evidence to support its contention that its members have a good faith belief that an abnormally dangerous condition exists or is it sufficient for the union merely to present evidence that the employees believe such a condition exists?

*Statutes Involved.***STATUTES INVOLVED**

This case involves the interpretation and application of Sections 203(d), 301(a) and 502 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136 et seq. 29 U.S.C. §141 et seq. (hereinafter "the Act"). They are printed in Appendix F, *infra*, pp. 27a-28a.

*Statement of the Case.***STATEMENT OF THE CASE**

On June 16, 1971, petitioner, Gateway Coal Company ("Gateway"), brought this action under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, to compel arbitration of an alleged safety dispute and to enjoin a strike in furtherance of that dispute.

The dispute giving rise to the work stoppage involved a claim by the union and its members that the Gateway mine was rendered unsafe by the presence of three third-shift foremen who were accused of having failed to record a reduction in air flow volume, which resulted from the partial blockage of an intake airway, in connection with a preshift examination of the mine.

On April 15, 1971, shortly before the daylight shift was scheduled to begin work in the mine, it was discovered that the flow of air through the work area was 11,000 cubic feet per minute as compared with a normal air flow of 28,000 cubic feet per minute (R.² 15, 18, 59, 64-67). Although the air flow was reduced, the work area still had an adequate supply of air, which was substantially above the federal and state ventilation requirements (R. 14-15, 55, 64-67).

2. Two almost identical Appendices (except for page numbers) were filed in the Court of Appeals, one by the United Mine Workers and its District No. 4, and the other, by Local Union No. 6330. For the convenience of the Court, all page references in this petition will be to the Appendix filed by Local No. 6330 and will be designated as "R.".

Statement of the Case.

The problem was traced to a partial blockage of an intake airway which is believed to have occurred at about 4:30 a.m. on April 15 (R. 14, 53, 72). Repairs were made immediately and normal air flow was restored (R. 20, 145-146).

Work proceeded without incident until the following morning when the company refused the union's request for reporting pay for April 15 for those miners who had ignored the company's instruction that they stand by until repairs were completed (R. 20). The company's offer to arbitrate the reporting pay dispute was rejected and the miners struck (R. 21-22).

On April 17, pursuant to a request by the union made after the strike had started over the reporting pay issue, federal and state inspectors visited the mine to determine the adequacy of the repairs (R. 22-23, 152). In the course of this investigation, it was discovered that three third-shift foremen had failed to record any reduction in air volume in connection with the pre-shift examination which each conducted between 5 a.m. and 8 a.m. (R. 71, 54). The company suspended two of the foremen pending its own investigation of the matter (R. 22, 54-55, 83-85). It decided against suspending the third foreman because he had reported the trouble (R. 22, 54-55).

On April 18, the Gateway miners attended a special meeting at which they voted not to return to work unless all three foremen were suspended (R. 141-142, 157). When notified of the union's position, the company reluctantly agreed to suspend the third foreman who had reported the trouble, but advised the union that the foremen would be returned to work when their certifica-

Statement of the Case.

tion status was clarified by the Commonwealth of Pennsylvania (R. 28, 99-102). The company was aware that consideration was being given by the state to the initiation of decertification proceedings, which would mean that the foremen could no longer serve as supervisors in the mine (R. 25, 89-90).

The Gateway miners returned to work on April 19 (R. 24, 112).

Subsequently, a criminal misdemeanor charge was filed against the foremen for falsifying mine records (R. 56, 52). However, after investigation the state decided against seeking to decertify the foremen. On May 29, the company received a copy of a letter addressed to the union from the Pennsylvania Department of Environmental Resources advising the union that in view of the satisfactory record and good performance of the foremen and the pending criminal action, the state had decided that no action should be taken to decertify the foremen and that the "company is at liberty to return the three (3) assistant foremen to work if it so desires" (R. 212).

Upon receipt of this letter, the company reinstated two of the foremen (one had retired while on suspension) and the union struck again on June 1 (R. 26-30, 113-114). The company's offer to arbitrate the question as to whether the mine was rendered unsafe by the presence of the two foremen in the mine was rejected by the union (P. Ex. 6; R. 33-34, 217-218).

At the time material to this proceeding, Gateway and the union were parties to the National Bituminous Coal Wage Agreement of 1968 (P. Ex. 1; R. 185-211).

Statement of the Case.

The "Settlement of Local and District Disputes" provision of that agreement contains a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final, and binding arbitration of "differences between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and "... differences . . . about matters not specifically mentioned in [the] agreement . . ." and "... any local trouble of any kind [arising] at the mine . . ." (R. 199).

The District Court found that the dispute giving rise to the work stoppage was arbitrable under the terms of the labor agreement and that the strike violated the agreement. On the basis of *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), it ordered arbitration of the dispute but directed that the foremen be suspended pending the outcome of the arbitration, and enjoined the Gateway employees from continuing their work stoppage (Appendix A, *infra*, pp. 3a-4a; Appendix B, *infra*, p. 10a). Thereafter, the impartial umpire ruled that the dispute was arbitrable even though it involved a safety claim; that the position of the Gateway employees in refusing to work with the two foremen was unfounded; that their presence in the mine did not render the mine unsafe; and that the union safety committee had acted arbitrarily and capriciously in causing the work stoppage (Appendix G, *infra*, pp. 29a-51a).

The Court of Appeals for the Third Circuit, in a two-to-one decision, reversed the judgment of the District Court and vacated the preliminary injunction.

The Court of Appeals concluded that the strike at the Gateway mine was not enjoined because, in its

Statement of the Case.

view, the dispute giving rise to the work stoppage was not arbitrable. Despite the extremely broad arbitration clause, the Court of Appeals held that the dispute as to whether the mine would be rendered unsafe by the continued presence of the foremen was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (Appendix C, p. 16a).

The Court of Appeals refused to apply the strong federal policy favoring arbitration, a view which it said was supported by Section 502 of the Labor-Management Relations Act of 1947. Safety disputes, it concluded, are "*sui generis*", and public policy "should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (Appendix C, pp. 16a, 18a).

The Court of Appeals also held that this Court's decision in *Boys Markets, supra*, was inapplicable because it involved "an economic dispute, not involving safety" (Appendix C, p. 18a, n. 1).

The Court of Appeals concluded that, under Section 502, the miners themselves are entitled to make a subjective determination as to what constitutes a safety hazard and that it is unnecessary for the union to prove by objective evidence that an abnormally dangerous condition does in fact exist (Appendix C, pp. 14a, 17a-18a).

Judge Rosenn, dissenting, expressed serious reservations that a good faith safety dispute underlay the strike enjoined by the District Court, but noted that "[w]hatever the probative weight of the evidence the

Statement of the Case.

union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration" (Appendix C, p. 21a). Judge Rosenn indicated particular concern with the majority's failure to require ascertainable, objective evidence that an abnormally dangerous condition for work exists, stating that "[a]cceptance of anything less by a court would be an abdication of its judicial role" (Appendix C, p. 22a).

Judge Rosenn found that the alleged dispute fell squarely within the language of the arbitration clause of the contract and was not excluded from arbitration by any other provision, and that for a court to order the matter to arbitration was harmonious with the policies underlying the Act and would provide for a final resolution of the dispute not inconsistent with Section 502 (Appendix C, pp. 23a-24a).

Finally, Judge Rosenn pointed out that "[v]acating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971" (Appendix C, p. 24a).

Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Contrary to Federal Labor Policy and in Direct Conflict With Decisions of This Court.

1. The decision of the court below that the federal labor policy favoring arbitration of industrial disputes is inapplicable to safety disputes is contrary to Section 203(d) of the Labor-Management Relations Act of 1947 and is in direct conflict with the applicable decisions of this Court interpreting and applying the federal labor policy set forth in this Section of the Act.

Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), this Court, after reviewing the federal labor policy favoring arbitration of grievance disputes, held that there is a presumption that such disputes are arbitrable, saying at pages 582-583:

"... An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Contrary to the clear dictates of *Warrior & Gulf*, the court below ruled that the safety dispute in question was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor con-

Reasons for Granting the Writ.

tract that the parties shall submit mine safety disputes to arbitration . . ." (Appendix C, p. 16a). Thus, the court below established a novel presumption of non-arbitrability for disputes involving safety. In doing so, the court below also ignored this Court's holding in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, that the federal labor policy set forth in Section 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

It would be difficult to write a broader arbitration clause than the one involved in this case. It not only provides for arbitration of differences as to the "meaning and application of the provision of [the] agreement" but for arbitration of "differences . . . about matters not specifically mentioned in [the] agreement" as well as "any local trouble of any kind [arising] at the mine" (R. 199). Moreover, in another section of the contract, the parties specifically agreed that all unresolved disputes, unless national in character, would be settled "by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement . . ." (R. 207). Thus, the decision of the court below failed to give "full play" to the means the parties chose for the resolution of the alleged safety dispute.

The court below claimed to find justification for its presumption of nonarbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947. It erroneously reasoned that "the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of

Reasons for Granting the Writ.

safety disputes by arbitration" (Appendix C, p. 18a). However, Section 502 does not specifically nor by necessary implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view of the court below that safety disputes are "*sui generis*" and are to be treated differently than any other kind of grievance disputes.³ (Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948) 29, 156, 290, 436, 573, 895.) In *Steelworkers v. American Mfg. Co.*, *supra*, this Court said (363 U.S. at 567) :

"Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement." (Emphasis added)

Arbitration of safety claims is clearly compatible with Section 502, which must be read *in pari materia*, not only with Section 301 but with Section 203(d), since all three sections are part of the same chapter of the Labor-Management Relations Act of 1947. As Judge Rosenn aptly observed in his dissenting opinion:

"... section [502] requires a third party, a court, to determine the reasonableness of the union's be-

3. It is apparent that the court below was under the misapprehension that safety disputes are rarely, if ever, arbitrated. Actually, safety disputes are arbitrated with such frequency that *Labor Arbitration Reports*, published by the Bureau of National Affairs, has a specific key number for arbitration cases dealing with safety and health disputes (§124.70) and another key number (§118.658) at which cases dealing with discharge or discipline for refusal to accept work assignments because of alleged safety or health hazards are collected.

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lief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision." (Appendix C, p. 23a)

Within the last three years, due to the growing concern over industrial safety and health, Congress has enacted the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §801 *et seq.* and the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §651 *et seq.*⁴ These statutes contemplate a joint employer-employee effort to reduce health and safety hazards, and to this end many collective bargaining agreements incorporate their terms by reference. The decision of the court below that safety disputes are not subject to arbitration prevents the parties from utilizing this means of peacefully resolving any disputes which may arise as to the interpretation and application of these statutes, thereby nullifying the intent of Congress.

2. The decision of the court below, by failing to give binding effect to the umpire's decision on the safety issue, is also in direct conflict with the holding of this Court in *Steelworkers v. Enterprise Corp.*, 363

4. It is estimated that the Occupational Safety and Health Act of 1970 alone applies to 4,100,000 business establishments with over 57,000,000 employees. Bureau of National Affairs, *The Job Safety and Health Act of 1970* (1971).

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U.S. 593 (1960), that "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

In the present case, an impartial arbitrator, with extensive experience in mining, determined that the dispute was arbitrable and that there was no safety hazard created by the continued presence of the foremen in the mine (Appendix G, p. 51a). Nevertheless, the court below concluded that the Gateway miners should not be required to accept the arbitrator's resolution of the safety dispute even though the labor agreement provides that "the decision of the umpire shall be final" (R. 199). It paid no heed to the caution expressed by this Court in *Steelworkers v. Enterprise Corp.*, *supra* at 599, that

"... the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his."

3. The decision of the court below is also in direct conflict with the decision of this Court in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235 (1970), as well as *Teamster Local 174 v. Lucas Flour Co.*, 369 U. S. 95 (1962).

In the *Lucas Flour* case, *supra*, this Court held that where, as here, there is a strike over a dispute which is subject to resolution under the arbitration clause of a labor agreement, the work stoppage constitutes a viola-

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tion of the collective bargaining agreement even when the agreement does not contain an explicit no-strike clause.⁵

In the *Boys Markets* case, *supra*, this Court expressly overruled its earlier decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and held that a federal court has jurisdiction under Section 301 of the Labor-Management Relations Act of 1947 to enjoin a strike over an arbitrable grievance. It did so because *Sinclair* stood as a significant departure from this Court's "otherwise consistent emphasis upon the congressional policy to promote peaceful settlement of labor disputes through arbitration . . ." (398 U.S. at 241). Viewed in this light, there simply is no basis for the conclusion of the court below that *Boys Markets* is limited in its application to "an economic dispute, not involving safety" (Appendix C, p. 18a, n. 1).

The decision of the court below that a strike over a safety dispute is not enjoinable will have a devastating impact on the stability of labor relations. Dissenting Judge Rosenn recognized quite clearly the potential unsettling effect of the majority opinion when he said:

5. Despite the absence of an express no-strike clause in the National Bituminous Coal Wage Agreement, since *Lucas Flour* lower courts have consistently implied an agreement not to strike over arbitrable disputes: *Blue Diamond Coal Co. v. Mine Workers*, 436 F.2d 551 (6th Cir. 1970); *Old Ben Coal Corp. v. Mine Workers*, 457 F.2d 2845 (7th Cir. 1972); *United States Steel Corporation v. United Mine Workers of America*, 320 F. Supp. 743, 746 (W.D.Pa. 1970); *United States Steel Corporation v. United Mine Workers*, 77 LRRM 3134 (E.D.Ky. 1971).

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" . . . If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes."

(Appendix C, p. 22a)

For this reason, the present case is of the utmost importance and concern, not only to Gateway and other signatories to the National Bituminous Coal Wage Agreement, but to all other employers and labor unions. While most labor agreements now contain a provision for arbitration of grievances, relatively few contain a specific provision making safety disputes arbitrable⁶ and even in that event, the decision below raises serious

6. This case arises under and was decided on the basis of the 1968 National Bituminous Coal Wage Agreement. The fact that in 1971 the agreement was revised to provide a special grievance-arbitration procedure for resolution of health and safety disputes does not diminish the importance of this case or its appropriateness for review.

Reasons for Granting the Writ.

doubt as to the employer's right to injunctive relief against wildcat safety strikes.⁷

Unless a federal court can enjoin a work stoppage over an alleged safety dispute and order arbitration of the underlying dispute, as the District Court did in this case on the basis of *Boys Markets*, how are such disputes to be resolved? The answer of the court below—that they are to be settled on the picket line—is hardly in keeping with the congressional policy enunciated in Section 203(d) and is a result neither contemplated by Section 301 nor required by Section 502.

7. The court below in the footnote in which it held *Boys Markets* to be inapplicable to safety disputes went on to state:

"It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable." (Appendix C, p. 18a, n.1)

Hanna Mining Co. v. Steelworkers, — F.2d —, 80 LRRM 3268 (8th Cir. 1972), while distinguishable on its facts, clearly conflicts in principle with the *Gateway* decision on this issue.

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B. The Case Raises a Vital Question Concerning the Interpretation of Section 502 of the Labor-Management Relations Act of 1947 Which Has Not Been, but Should Be, Decided by This Court.

Section 502 of the Labor - Management Relations Act of 1947 provides that "... the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act."

Until the present case, as Judge Rosenn pointed out in his dissent, the decisions interpreting Section 502 have uniformly held that to justify a work stoppage over unsafe conditions, the union must present ascertainable objective evidence that an abnormally hazardous condition did in fact exist: *NLRB v. Knight Morley Corporation*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958); *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (3rd Cir. 1964), *cert. denied*, 379 U.S. 833, 841 (1964). Thus, in *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964), it was held that a good faith belief that working conditions were abnormally dangerous is insufficient to establish that a strike was protected under Section 502 unless there was proof of physical facts to support that belief. "What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous'": *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961). To the same effect: *Stop & Shop, Inc.*, 161 NLRB 75 (1966).

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The decision of the court below represents a clear departure from this previously uniform interpretation of Section 502 by its conclusion that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. As dissenting Judge Rosenn pointed out:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." (Appendix C, p. 22a)

Judge Rosenn's observation is borne out by the refusal of the court below to accept the results of investigations conducted by impartial federal and state agencies vested by statute with authority to make third-party determinations concerning mine safety. The federal mine inspector who inspected the mine on April 17 had the authority under Section 104(a) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §814(a), to issue a withdrawal order if he determined that an imminent danger⁸ existed because of the presence of the foremen in the mine. He did not take this action. Similarly, the Commonwealth of Pennsylvania, after an impartial investigation, concluded that decertification proceedings were not appropriate and advised the parties that the company was at liberty to return the foremen to work. These facts were known to the Gateway miners before the strike, which originally

⁸ Section 3(j) of the Coal Mine Health and Safety Act, 30 U.S.C. §802(j), defines "imminent danger" to mean "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

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started over a reporting pay dispute, was resumed on June 1.

Thus, the ruling of the court below makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court.

If there were any doubt that this is the necessary effect of the decision below, it has been dispelled by a very recent decision of the Court of Appeals for the Third Circuit in which the Court applied the *Gateway* decision in vacating a preliminary injunction against another wildcat safety strike. In *United States Steel Corporation v. United Mine Workers*, Nos. 71-1974/75 (3rd Cir. filed November 6, 1972),⁹ the Court of Appeals said of its decision in *Gateway*:

"The entire thrust of that decision was that it is the miners themselves who should make the determination as to what constitutes a safety decision."

This Court has never accepted for review a case which involved the interpretation of Section 502 or the relationship of this Section with Sections 301 and 203(d) of the Labor-Management Relations Act of 1947. The question of whether an objective or a subjective test is to be applied in determining if a work stoppage is entitled to protection under Section 502 is one of the

9. One member of the panel (Senior Judge Layton) concurred only because he felt bound by the majority opinion in *Gateway*. Otherwise he would have dissented for the reasons, among others, advanced by Judge Rosenn in the *Gateway* case. A petition for a writ of certiorari is being prepared and will shortly be filed in the *United States Steel Corporation* case.

Conclusion.

utmost importance, which has not been, but should be, resolved by this Court.

Finally, the decision of the court below raises an additional question concerning the proper scope of Section 502. Although the foremen alleged to constitute the abnormally dangerous condition worked on the third shift, the protection of that Section was extended to strikers who worked on the first and second shifts and to those who were employed on the surface rather than underground in the mine. The degree to which the protection of Section 502 extends to employees not physically located at or near an alleged abnormally hazardous condition for work is a question which has not been, but should be, decided by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

**GATEWAY COAL COMPANY, Plaintiff,
versus
UNITED MINeworkERS OF AMERICA; DIS-
TRICT NO. 4, UNITED MINeworkERS OF
AMERICA; LOCAL NO. 6330, UNITED MINE-
WORKERS OF AMERICA; Defendants.**

71-567

Order

And now, June the 18th, 1971, after consideration of the testimony taken this date in the within captioned proceeding, that is, the Gateway proceeding, which is 71-567, it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for work since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will

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cause irreparable harm not only to the plaintiff but to the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there.

It appears that there is a labor dispute at the Gateway Mine of the three corporations already mentioned. It is apparent to the Court that the labor dispute involves two assistant mine foremen who are sufficiently identified in the testimony. It is apparent that the dispute concerns whether or not the employees of the company who belong to the local union already identified will work with the assistant mine foremen in question.

It is apparent that an impasse has existed and apparently has not been resolved. On the one hand, one of the witnesses for the union contends that the dispute was virtually settled, as far as he understood, by an agreement that the foremen or assistant foremen would be suspended until the state had taken care of the matter, and, in his mind, he believes that this referred to criminal proceedings, entirely separate and apart from these proceedings, which apparently are pending in the Greene County Court. On the other hand, management thought that this dispute would be settled by suspending the men only until a matter of decertification was determined by the officers of the State Department of Mines. Apparently, in his opinion, it was necessary only to wait for some indication from the state officials that the men would not be decertified.

This impasse has continued, apparently, in a situation where no one can move one way or the other.

It is apparent that the labor agreement is involved. We have made our own interpretation of the labor

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agreement, as it is our duty to do, and we have thoroughly considered the labor agreement and all sections of it.

Accordingly, the following orders are made.

First, the employees of the Gateway Mine, their officers, and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:

(a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.

(b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issues stated forthwith and as soon as the hearing can be held, and neither party to this agreement — that is, the union agreement — shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.

(c) The decision of the umpire will be final and both parties will be bound by that decision.

It is the intention of the Court that this proceeding will not exceed 60 days.

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The mine will continue working, and the members of the union and all persons who are their officers or agents are enjoined from a work stoppage meanwhile. Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be returned to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working.

The members of the Gateway Mine local are enjoined from encouraging or picketing or aiding or threatening the miners at the Vesta 4, Vesta 5, and Shannopin mines from working, pursuant to this order. As has already been stated, those mines are subject to separate orders.

This is a temporary restraining order, and it is issued upon condition that a bond shall be filed by the plaintiff in the sum of \$6,500, on the condition that the plaintiff shall pay the defendant such damages as may be found due in the event it is found at a later time that the plaintiff was not entitled to this order.

This order shall continue until hearing to determine whether a preliminary injunction should issue.

At this time, the hearing is fixed for the 23rd day of June, at 2:00 o'clock p.m.

The United States Marshal is directed to serve copies of the temporary restraining order on the above-named defendants.

HON. BARRON P. McCUNE
District Judge

Appendix B.**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GATEWAY COAL COMPANY, Plaintiff**vs.****UNITED MINE WORKERS OF AMERICA; DIS-
TRICT NO. 4, UNITED MINE WORKERS OF
AMERICA; LOCAL NO. 6330, UNITED MINE
WORKERS OF AMERICA, Defendants****Civil Action
No. 71-567**

Memorandum and Order**BARRON P. McCUNE, District Judge
June 28th, 1971.**

On June 18, 1971, this Court entered a temporary restraining order in the within captioned case after a hearing which began June 17, 1971, and ended June 18, 1971.

Following a hearing on June 23, 1971, to determine whether to grant a petition for a preliminary injunction the Court now determines that the preliminary injunction should be granted.

It is apparent from a study of the National Bituminous Coal Wage Agreement of 1968 that the issue in the instant case must be arbitrated and that the employees of the mine who are members of the United Mine Workers of America must work meanwhile.

On page 45 of the agreement under the heading *Miscellaneous* (paragraph 3) it is stated that the par-

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ties to the agreement affirm that they will maintain the integrity of the agreement and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of the agreement.

On page 31 there is provided a scheduled means of settling all disputes ending with step five which is compulsory arbitration before an umpire selected by both parties whose decision shall be binding.

The defendant local union (No. 6330) contends that a dispute concerning safety is never arbitrated and cannot be arbitrated.

We disagree. Under the section of the agreement headed "Mine Safety Program" paragraph (e) (page 8) it is provided that a mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes that the conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special circumstances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. (It is not set forth who removes these people).

Grievances that may arise as a result of a request for removal of a member of the safety committee under

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this section shall be handled in accordance with the provisions providing for settlement of disputes (Emphasis supplied).

The local union contends that a safety dispute exists. Assuming a safety dispute does exist it has resulted in an impasse to which there must be some solution other than an idle coal mine which employs hundreds of men (550 according to the testimony).

We conclude that an injunction should issue under the case of *Boys Market Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

On or about April 16, 1971, three assistant mine foremen were accused by the union of making false notes in their logs concerning the state of ventilation in the mine. There had been a fall on an overcast in the mine about 4:00 A.M. on April 15, 1971, which required repair and which had resulted in an investigation into all phases of ventilation. When the morning shift reported for work on April 15, 1971, it was temporarily prevented from entering the mine by the Superintendent while he made certain that the mine was safe. By 11:00 A.M. on April 15, 1971, the mine was cleared for work and about 100 men (a partial force) entered and worked. The remainder had gone home. The mine worked the afternoon and night shift on the 15th. On the morning of the 16th, according to the management witnesses the local union committee said the men would not work unless reporting pay was given to the men who had not worked on the morning of April 15th. This was refused but arbitration of that issue was offered. The men did not work on Friday the 16th.

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The local union officers contend that the men did not work on the 16th because of the fear that the mine was unsafe. They were convinced that the assistant foremen in question had breached safety regulations by making false entries in their logs. On the 16th an investigation by the company ensued and on the 17th (Saturday) State and Federal Mine Inspectors were called in. On Sunday the 18th, the union resolved that the mine would not work unless the accused were suspended and the company suspended the men forthwith. The mine worked from 12:01 A.M., the 19th of April until 12:01 A.M., June 2, 1971, when the men stopped work again. The reason obviously was the reinstatement by management of the suspended men. Only two assistant foremen were now concerned, the third having meanwhile retired.

Meanwhile the men in question had been charged by a state mine inspector with a violation of the mining law but the Department of Mines had also written to management that it had no objection to reinstatement.

The general manager of the operation and the district president of the Union had talked about the men and how long they would remain suspended. The general manager contended there was no definite agreement but he thought he could reinstate them when the Department of Mines indicated they would not be decertified. He took the Department's letter as a green light.

The president of District 4 of the United Mine Workers testified that he considered that he had an agreement that the suspended men would not be reinstated pending the determination of the question by the

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state. He thought that this meant a determination of the criminal charges. We cannot find that any agreement existed between these men because there was no meeting of the minds.

In any event when the assistant foremen returned to work the employees walked out. There was no formal procedure employed under the labor agreement in force, i.e., under the heading "Mine Safety Program."

It is apparent that the men contend that the mine is unsafe if the assistant foremen are in a supervisory capacity within the mine. It is apparent that management contends that this is an arbitrary position. In our view a grievance obviously exists which must be handled in accordance with the provisions of the agreement providing for the settlement of disputes.

Accordingly, we ordered the matter arbitrated.

It is also apparent that there will be no lack of safety meanwhile if the assistant foremen are not on the job. Therefore no reasons exists for the mine to remain idle.

It is implicit in the agreement that the men will work during the term of the agreement. Otherwise there is no rationale for a term during which the agreement will be observed.

Counsel for the United Mine Workers requests that District No. 4 be deleted from the order. We will refuse this request. District No. 4, as we understand it, is responsible for supervision of all locals within the district.

The company has requested that we permit the assistant foremen to return to work in a non supervisory

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capacity pending the arbitration. We will refuse this request as well. In our opinion it would be very easy to create an argument that the men were in some way affecting the safety of the mine unless they were put to work as ordinary laborers. We dislike demoting them to non supervisory status. We have some regard for their prestige in the eyes of their fellow men and consider suspension pending arbitration a better result than a demotion pending arbitration.

We hesitate to open the door to another hearing on the question whether their return to work did in some way affect safety which justified an entire mine being called unsafe and unworkable.

We have reviewed the temporary restraining order and while it is brief and was dictated on the bench without much time for reflection we will convert it into a preliminary injunction without change.

Order

AND NOW, June 28, 1971, the temporary restraining order of June 18, 1971, filed in the within case shall now constitute a preliminary injunction without change until further order of this Court.

S/ BARRON P. McCUNE
United States District Judge

*Appendix C.***APPENDIX C**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 71-1641, 71-1642 and 71-1786

GATEWAY COAL COMPANY

v.

**UNITED MINE WORKERS OF AMERICA; DISTRICT
NO. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL 6330, UNITED MINE WORKERS OF
AMERICA.**

UNITED MINE WORKERS OF AMERICA,
Appellant in No. 71-1641

**DISTRICT NO. 4, UNITED MINE WORKERS
OF AMERICA,**
Appellant in No. 71-1642

**LOCAL NO. 6330, UNITED MINE WORKERS
OF AMERICA,**
Appellant in No. 71-1786

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**Argued February 7, 1972
Before KALODNER, HASTIE and M. ROSENN,
Circuit Judges**

*Appendix C.***Opinion of the Court**

(Filed July 18, 1972)

HASTIE, Circuit Judge.

This is an appeal from an order, entered after hearing, that stated merely that a preceding temporary restraining order "shall now constitute a preliminary injunction without change until further order of this Court."

The underlying cause of controversy was the failure of three assistant foremen at a large underground coal mine to carry out certain prescribed mine safety procedures on a particular occasion and the consequent refusal of the miners to work so long as those supervisors should be employed. The miners also rejected a proposal to submit the matter to binding arbitration.

In its complaint the mine owner, Gateway Coal Co., invoked the jurisdiction of the district court under section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, and asked the court to order binding arbitration of the controversy and also to restrain the union from striking to enforce its demands for the removal of the foremen. In its temporary restraining order, later converted into a preliminary injunction, the court ordered that the dispute be submitted to an impartial umpire for binding decision, that the controversial mine foremen be suspended pending the umpire's decision and that the employees not strike to enforce their demands for the removal of these supervisors.

During the pendency of this appeal the impartial umpire rendered his decision in which he determined

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that the assistant foremen should be permitted to return to work. Accordingly, two of those foremen have resumed their duties as supervisory employees responsible for mine safety procedures. Thus, in its present and continuing effect the injunction from which this appeal has been taken compels miners to accept an arbitrator's decision that their safety is not significantly jeopardized by risks inherent in working under certain foremen whose handling of safety procedures they distrust and prohibits them from refusing to work despite their own apprehension of danger.

In greater detail, the undisputed facts are these. On April 15, 1971, shortly after the daylight shift began work in the mine, it was discovered that the flow of air through a work area was 11,000 cubic feet per minute as contrasted with a normal 28,000 cubic feet. This increased the danger of the accumulation of dust and flammable gas and the risk of consequent explosion. Subsequent investigation disclosed a partial blockage of an intake airway. This was corrected promptly and normal air flow was restored.

On April 16 and 17, pursuant to a request by the union, federal and state inspectors visited the mine and investigated the circumstances of the April 15 incident and the adequacy of the consequent repair work. In the course of this investigation it was discovered that three assistant mine foremen, whose duty it was to check and record airflow before the daylight shift began work, had made false entries in their log books that failed to disclose the true air flow at the time in question.

On Sunday, April 18, some 200 Gateway employees attended a special union meeting and unanimously voted

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not to work under the assistant foremen in question. The next day the foremen were suspended by management. Criminal proceedings also were instituted against them for falsifying mine records.

Late in May, the Pennsylvania Department of Mines notified Gateway that it did not object to the reinstatement of the suspended foremen, though criminal proceedings against them were still pending. On June 1, Gateway reinstated two of the foremen. The third had elected to retire.

When the foremen returned to work on June 1, the union employees left the job. This work stoppage continued while Gateway offered to arbitrate the dispute. The union refused to arbitrate. Gateway then filed the present suit and obtained the now challenged order that terminated the work stoppage and compelled arbitration of the dispute.

Subsequently the arbitrator found that the dispute was arbitrable, that the contention of the miners that the retention of the foremen with safety responsibilities would be dangerous was without merit and that the foreman should be allowed to perform their assigned tasks without interference.

There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction. Indeed, they pleaded *nol contendere* to a charge of criminal violation of safety requirements and were fined \$200 each. And there had been a few earlier complaints concerning their handling of matters involving safety.

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The employer reasons that the present dispute was arbitrable under the terms of the collective bargaining agreement of the parties and, therefore, that a strike that repudiates the agreed settlement procedure and attempts to compel acceptance of the union's demands is an enjoined violation of the labor contract, even in the absence of a no-strike agreement, as held by the Supreme Court in *Teamster Local 174 v. Lucas Flour Co.*, 1962, 369 U.S. 95.

The applicable National Bituminous Coal Wage Agreement of 1968 contains a section on "Settlement of Local and District Disputes." That section provides that "should any local trouble of any kind arise at the mine" an attempt shall be made to settle it by local negotiation and, if necessary, by a board composed of two representatives of the union and two representatives of management. Should these procedures fail, the dispute is to be referred to an impartial umpire and the "decision of the umpire shall be final." The mineowner relies upon this provision.

The union argues that this general section on local disputes was not intended to control employee response to or rejection of hazardous working conditions. It is pointed out that another part of the labor contract specifically provides that, regardless of the views or judgment of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous. And in this case a union membership meeting, the body superior of the mine safety committee, unanimously voted to stay out of the mine because of a particular hazard. Moreover, witnesses, both for the union and for the employer, testified at the hearing in

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this case that they did not know of any case in which a disagreement on a safety matter had been handled through arbitration.

Thus, it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary.

We recognize that in interpreting and applying labor contracts there is a strong federal policy in favor of arbitration as a method of settling the ordinary type of labor disputes concerning wages, hours, seniority, vacations and other economic matters. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574; *Radio Corporation of America v. Association of Professional Engineering Personnel*, 3d Cir. 1961, 291 F.2d 105. However, a dispute concerning the safety of the place and circumstances in which employees are required to work is *sui generis*. The present case exemplifies the special and distinguishing character of safety disputes. Underground mining is a hazardous occupation at best. Necessarily, men who risk their lives daily in the course of this occupation are acutely concerned that every reasonable precaution be taken at all times to prevent a catastrophic accident. Any failure of responsible supervisors to perform their assigned duty to check air flow in a mine and to record and immediately report any significant diminution can cause the death of many men. In such circumstances, a single negligent failure to take a required safety precaution may reasonably be viewed as intolerable by those whose lives are at stake.

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Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.

This view of public policy is strongly supported by specific legislation. Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, under which this suit was brought, and section 502 are *in pari materia*, both being part of the same chapter in the 1947 enactment. Section 301 gives the district courts jurisdiction over "suits for violation of [labor] contracts covered by "this chapter." In relevant part, section 502 provides: "nor shall the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work at . . . [their] place of employment . . . be deemed a strike under this chapter." 29 U.S.C. §143.

In applying section 502, this court has held that a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract. *Philadelphia Marine Trade Association v. N.L.R.B.*, 1964, 330 F.2d 492, cert. denied 379 U.S. 833 and 841. Accord,

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N.L.R.B. v. Knight Morley Corp., 6th Cir. 1957, 251 F.2d 753, cert. denied, 357 U.S. 927.

Actually, a duty to accept the procedure of binding arbitration and a duty not to strike are opposite sides of a single coin. Therefore, the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration.

For these reasons the present contract should not be construed as providing for compulsory arbitration of safety disputes.¹ Accordingly, in this case neither the miners' refusal to work nor their refusal to arbitrate the safety dispute was a violation of their labor contract. There was no wrong to enjoin. Yet, the preliminary injunction from which this appeal has been taken even now has the continuing effect of requiring the miners to accept the arbitrator's resolution of the safety dispute and to refrain from any work stoppage even if they still honestly believe that working under the controversial foremen subjects them to unacceptable

1. This conclusion makes it unnecessary to discuss *Boys Market, Inc. v. Retail Clerk's Union*, 1970, 398 U.S. 235, upon which appellee places great reliance. For that decision is grounded upon a finding that an economic dispute, not involving safety, was subject to compulsory arbitration under the employees' labor contract.

It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable.

danger. The miners should be relieved of this compulsion.

We have not overlooked an argument that the concept of a safety dispute and any special privilege or protection accorded employees in such a matter should be restricted to disputes concerning the physical conditions under which employees are required to work. However, we reject that suggested limitation. Careless or incompetent administration of important safety precautions can add as much to the hazards of dangerous employment as can the physical condition of the work place itself. And the normal concern of employees about danger from the one source is not essentially different from concern about the other. We are satisfied that any special freedom of action that should be accorded to employees in connection with safety disputes in general is fully applicable to the present controversy.

The judgment will be reversed and the cause remanded for a vacating of the preliminary injunction.

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ROSENN, *Circuit Judge*, dissenting.

I respectfully dissent.

Without attempting to analyze the motivations for the strike offered by the company, I believe that it is significant that the safety issue was not raised until after the union went on strike over the company's refusal to pay the men who failed to work on April 15th.

In addition, I have other serious reservations about the argument that the June continuance of the strike was because of the safety issue. If working with the two assistant foremen who were on the third shift was the genuine concern of the union, what explanation can be offered for the unilateral action of the union in calling off all men employed in the mine? Men were called off who were not working on the same shift with the two assistant foremen. Others who were employed on the surface also struck.

The union contended that the presence of the two assistant foremen in the mine constituted a safety hazard because they had committed isolated violations of mine safety regulations in the past. However, the record is to the contrary. First, the union had never complained about the alleged past violations, and the assistant foremen had continued in their jobs without objection from the union. Second, the union president was notified by the Pennsylvania Department of Environmental Resources, which exercises jurisdiction over coal mines, that:

In view of the satisfactory record and good performance of these foreman (sic) in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal com-

pany is at liberty to return the three (3) assistant foreman (sic) to work if it so desires.¹

The only blot on their records was the April incident which the Commonwealth authorities did not believe warranted lifting of their licenses or precluding them from work. In view of the investigation conducted by the Commonwealth, its findings, which are expert and impartial, are of the utmost importance.

Whatever the probative weight of the evidence the union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration. Although it recognizes that in interpreting and applying labor contracts there is a strong federal policy in favor of arbitration, it considers "a dispute concerning the safety of the place and circumstances in which employees are required to work [as] *sui generis*." It would seem to conclude that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. Under this view, what criteria shall be used to measure union belief, especially when it concerns an assessment of the skill and integrity of a supervisory employee? I

1. The same letter to the union president concluded with the following statement:

"The objectives of the mining laws of this State is (sic) to enhance and assure mine safety. The penalty language in the Bituminous Mining Law was meant to penalize violators of the mining law to the extent deemed appropriate by the judiciary. Other than the above noted action on the part of our District Inspector and the penalty imposed by the magistrate, we feel that sufficient action has been taken by the Commonwealth in this case."

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believe that when a union raises Section 502 as a justification for a work stoppage, particularly in situations involving the subjective assessment we have here, the union must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists. See, e.g., *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (3d Cir. 1964) (use of slings instead of pallets to unload ship); *NLRB v. Knight Morely Corp.*, 251 F.2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958) (broken fan blower). Acceptance of anything less by a court would be an abdication of its judicial role.

But this result may be what the majority opinion portends. Its new test is that "[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .", they need not arbitrate. This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of "wildcat-ers." In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes.

Further, I believe the majority misapprehends the effect of Section 502 on the court's ability to compel

arbitration under a contract. The Supreme Court in *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) held that there is an obligation not to strike coterminous with the contract's arbitration clause even in the absence of a specific no-strike clause. The majority would now seem to read that decision to say that if a court cannot enjoin a strike, it cannot compel arbitration of the issue in spite of a broad arbitration agreement. I believe that such reasoning is unwarranted and undercuts the salutary principle of *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), which permits federal courts to order disputes covered by an appropriate provision to an arbitrator. Section 502 nowhere states or implies that safety issues are not appropriate for an arbitrator's decision. In fact, as I view it, the section requires a third party a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision.

It seems perfectly reasonable and logical that even if a court cannot order employees to return to work because of Section 502, it can still order the matter to arbitration if the contract so states. Such a result would properly harmonize the federal policies in favor of both worker protection and peaceful settlement of labor disputes.

Were it not for the majority's conclusion on this point, I believe the contract would compel the union to submit the safety question to arbitration. The Na-

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tional Bituminous Coal Wage Agreement of 1968 contains a broad arbitration clause providing for final and binding arbitration, including as well "... differences ... about matters not specifically mentioned in [said] agreement ..." and "... any local trouble of any kind [arising] at the mine. ..." This dispute fell squarely within the language of this arbitration clause and was not excluded from arbitration by any other provision of the agreement. *See, e.g., Blue Diamond Coal Co. v. United Mine Workers*, 436 F.2d 551 (6th Cir. 1970).

Finally, it is important to point out that the preliminary injunction avoided the Section 502 issue by specifically providing for the continued safety of the men in the mine. It forbade the foremen from returning to their jobs pending the resolution of the dispute. This protection was all the union could properly demand in light of the appropriate arbitration order.

Vacating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971. I would affirm the order of the district court.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 71-1641/71-1642 and 71-1786

GATEWAY COAL COMPANY

vs.

UNITED MINE WORKERS OF AMERICA;

DISTRICT NO. 4,

UNITED MINE WORKERS OF AMERICA;

LOCAL NO. 6330,

UNITED MINE WORKERS OF AMERICA

**UNITED MINE WORKERS OF AMERICA, Appellant
in No. 71-1641**

**DISTRICT NO. 4, UNITED MINE WORKERS OF
AMERICA, Appellant in No. 71-1642**

**LOCAL UNION NO. 6330, Appellant in No. 71-1786
(D. C. Civil Action No. 71-567)**

ON APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and ROSENN, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

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said District Court, filed June 28, 1971, be, and the same is hereby reversed, and the cause remanded for a vacating of the preliminary injunction, with costs taxed in favor of appellants.

ATTEST:

.....
Clerk

July 18, 1972

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1641, 71-1642 and 71-1786

GATEWAY COAL COMPANY, *Appellee*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT
NO. 4, UNITED MINE WORKERS OF AMERICA; LO-
CAL 6330, UNITED MINE WORKERS OF AMERICA

UNITED MINE WORKERS OF AMERICA,
Appellant in No. 71-1641

DISTRICT NO. 4, UNITED MINE WORKERS OF
AMERICA, *Appellant in No. 71-1642*

LOCAL NO. 6330, UNITED MINE WORKERS OF
AMERICA, *Appellant in No. 71-1786.*

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*; and KALODNER, HASTIE,
VAN DUSEN, ALDISERT, ADAMS, GIBBONS, M. ROSENN,
J. ROSEN and HUNTER, *Circuit Judges.*

The petition for rehearing filed by GATEWAY COAL COMPANY, *Appellee* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ FRANCIS L. VAN DUSEN
Circuit Judge

Dated: August 30, 1972

APPENDIX F

STATUTES INVOLVED

Section 203(d) (29 U.S.C. §173(d)) of the Labor-Management Relations Act of 1947 reads as follows:

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Appendix F.

Section 301(a) (29 U.S.C. §185(a)) of the Labor-Management Relations Act of 1947 reads as follows:

(a) Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 502 (29 U.S.C. §143) of the Labor-Management Relations Act of 1947 reads as follows:

Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

APPENDIX G

Umpire Decision and Award

**LOCAL UNION NO. 6330, DISTRICT 4
UNITED MINE WORKERS OF AMERICA**

VS

GATEWAY COAL COMPANY

This grievance case came on for hearing before the undersigned umpire at the Holiday Inn, Uniontown, Pennsylvania on Tuesday, August 10, 1971. The umpire was selected by the agreement of the parties in accordance with the Grievance Procedure of the Wage Agreement and as directed by orders of the United States District Court for the Western District of Pennsylvania.

A hearing was held in Federal Court and resulted in the court issuing a temporary restraining order on June 18, 1971. An additional order was entered by the court making the temporary restraining order a preliminary injunction. These Federal Court orders were filed in the record as exhibits in this case. Since the orders are necessary to a determination of this case, they are quoted as follows:

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GATEWAY COAL COMPANY, Plaintiff,

— versus —

UNITED MINE WORKERS OF AMERICA:

DISTRICT No. 4

UNITED MINE WORKERS OF AMERICA:

LOCAL No. 6330

UNITED MINE WORKERS OF AMERICA.

Defendants.

*Appendix G.***Order**

And now, June the 18th, 1971, after consideration of the testimony taken this date in the within captioned proceeding, that is, the Gateway proceeding, which is 71-567, it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for work since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will cause irreparable harm not only to the plaintiff but to the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there.

It appears that there is a labor dispute at the Gateway Mine of the three corporations already mentioned. It is apparent to the court that the labor dispute involves two assistant mine foremen who are sufficiently identified in the testimony. It is apparent that the dispute concerns whether or not the employees of the Company who belong to the local union already identified will work with the assistant mine foremen in question.

It is apparent that an impasse has existed and apparently has not been resolved. On the one hand, one of the witnesses for the union contends that the dispute was virtually settled, as far as he understood, by an agreement that the foremen or assistant foremen would be suspended until the state had taken care of the matter and, in his mind, he believes that this referred, to criminal proceedings, entirely separate and apart from these proceedings. which apparently are pending in the Greene County Court. On the other hand, management thought that this dispute would be settled by suspending the men only until a matter of decertification was determined by the officers of the State Department of Mines. Apparently, in his opinion, it was necessary only to wait for some indication from the state officials that the men would not be decertified.

This impasse has continued, apparently, in a situation where no one can move one way or the other.

It is apparent that the labor agreement is involved. We have made our own interpretation of the labor agreement, as it is our duty to do, and we have thoroughly considered the labor agreement and all sections of it.

Accordingly, the following orders are made.

First, the employees of the Gateway Mine, their officers and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:

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(a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.

(b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issue stated forthwith and as soon as the hearing can be held, and neither party to this agreement—that is, the union agreement—shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.

(c) The decision of the umpire will be final and both parties will be bound by that decision.

It is the intention of the Court that this proceeding will not exceed 60 days.

The mine will continue working, and the members of the union and all persons who are their officers or agents are enjoined from a work stoppage meanwhile. Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be returned to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working.

The members of the Gateway Mine local are enjoined from encouraging or picketing or aiding or threatening the miners at the Vesta 4, Vesta 5, and Shannopin mines from working, pursuant to this order. As has already been stated, those mines are subject to separate orders.

This is a temporary restraining order, and it is issued upon condition that a bond shall be filed by the plaintiff in the sum of \$6,500, on the condition that the plaintiff shall pay the defendant such damages as may be found due in the event it is found at a later time that the plaintiff was not entitled to this order.

This order shall continue until hearing to determine whether a preliminary injunction should issue.

At this time, the hearing is fixed for the 23rd day of June, at 2:00 o'clock p.m.

The United States Marshal is directed to serve copies of this temporary restraining order on the above-named defendants.

HON. BARRON P. McCUNE
District Judge

Appendix G.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GATEWAY COAL COMPANY, Plaintiff	}	Civil Action No. 71-567
v.		
UNITED MINE WORKERS OF AMERICA; DISTRICT No. 4,		
UNITED MINE WORKERS OF AMERICA; LOCAL No. 6330,		
UNITED MINE WORKERS OF AMERICA. Defendants		

Memorandum and Order

BARRON P. McCUNE, District Judge
June 28th, 1971.

On June 18, 1971, this Court entered a temporary restraining order in the within captioned case after a hearing which began June 17, 1971, and ended June 18, 1971.

Following a hearing on June 23, 1971, to determine whether to grant a petition for a preliminary injunction the Court now determines that the preliminary injunction should be granted.

It is apparent from a study of the National Bituminous Coal Wage Agreement of 1968 that the issue in the instant case must be arbitrated that that the employees of the mine who are members of the United Mine Workers of America must work meanwhile.

On page 45 of the agreement under the heading *Miscellaneous* (Paragraph 3) it is stated that the par-

ties to the agreement affirm that they will maintain the integrity of the agreement and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of the agreement.

On page 31 there is provided a scheduled means of settling all disputes ending with step five which is compulsory arbitration before an umpire selected by both parties whose decision shall be binding.

The defendant local union (No. 6330) contends that a dispute concerning safety is never arbitrated and cannot be arbitrated.

We disagree. Under the section of the agreement headed "Mine Safety Program" paragraph (e) (Page 8) it is provided that a mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes that the conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special circumstances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee.

(It is not set forth who removes these people.)

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Grievances that may arise as a result of a request for removal of a member of the safety committee under this section *shall be handled in accordance with the provisions providing for settlement of disputes* (underlining supplied).

The local union contends that a safety dispute exists. Assuming a safety dispute does exist it has resulted in an impasse to which there must be some solution other than an idle coal mine which employs hundreds of men (550 according to the testimony).

We conclude that an injunction should issue under the case of *Boys Market Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

On or about April 16, 1971, three assistant mine foremen were accused by the union of making false notes in their logs concerning the state of ventilation in the mine. There had been a fall on an overcast in the mine about 4:00 A.M. on April 15, 1971, which required repair and which had resulted in an investigation into all phases of ventilation. When the morning shift reported for work on April 15, 1971, it was temporarily prevented from entering the mine by the Superintendent while he made certain that the mine was safe. By 11:00 A.M. on April 15, 1971, the mine was cleared for work and about 100 men (a partial force) entered and worked. The remainder had gone home. The mine worked the afternoon and night shift on the 15th. On the morning of the 16th, according to the management witnesses the local union committee said the men would not work unless reporting pay was given to the men who had not worked on the morning of April 15th. This was refused but arbitration of that issue was offered. The men did not work on Friday the 16th.

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The local union officers contend that the men did not work on the 16th because of the fear that the mine was unsafe. They were convinced that the assistant foremen in question had breached safety regulations by making false entries in their logs. On the 16th an investigation by the company ensued and on the 17th (Saturday) State and Federal Mine Inspectors were called in. On Sunday the 18th, the union resolved that the mine would not work unless the accused were suspended and the company suspended the men forthwith. The mine worked from 12:01 A.M., the 19th of April until 12:01 A.M., June 2, 1971, when the men stopped work again. The reason obviously was the reinstatement by management of the suspended men. Only two assistant foremen were now concerned, the third having meanwhile retired.

Meanwhile the men in question had been charged by a state mine inspector with a violation of the mining law but the Department of Mines had also written to management that it had no objection to reinstatement.

The general manager of the operation and the district president of the Union had talked about the men and how long they would remain suspended. The general manager contended there was no definite agreement but he thought he could reinstate them when the Department of Mines indicated they would not be decertified. He took the Department's letter as a green light.

The president of District 4 of the United Mine Workers testified that he considered that he had an agreement that the suspended men would not be rein-

Appendix G.

stated pending the determination of the question by the state. He thought that this meant a determination of the question by the state. He thought that this meant a determination of the criminal charges. We cannot find that any agreement existed between these men because there was no meeting of the minds.

In any - event when the assistant foreman returned to work the employees walked out. There was no formal procedure employed under the labor agreement in force, i.e., under the heading of "Mine Safety Program."

It is apparent that the men contend that the mine is unsafe if the assistant foremen are in a supervisory capacity within the mine. It is apparent that management contends that this is an arbitrary position. In our view a grievance obviously exists which must be handled in accordance with the provisions of the agreement providing for the settlement of disputes.

Accordingly, we ordered the matter arbitrated.

It is also apparent that there will be no lack of safety meanwhile if the assistant foremen are not on the job. Therefore no reasons exists for the mine to remain idle.

It is implicit in the agreement that the men will work during the term of the agreement. Otherwise there is no rationale for a term during which the agreement will be observed.

Counsel for the United Mine Workers requests that District 4 be deleted from the order. We will refuse this request. District No. 4, as we understand it, is responsible for supervision of all locals within the district.

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The company has requested that we permit the assistant foreman to return to work in a nonsupervisory capacity pending the arbitration. We will refuse this request as well. In our opinion it would be very easy to create an argument that the men were in some way affecting the safety of the mine unless they were put to work as ordinary laborers. We dislike demoting them to non supervisory status. We have some regard for their prestige in the eyes of their fellow men and consider suspension pending arbitration a better result than a demotion pending arbitration.

We hesitate to open the door to another hearing on the question whether their return to work did in some way affect safety which justified an entire mine being called unsafe and unworkable.

We have reviewed the temporary restraining order and while it is brief and was dictated on the bench without much time for reflection we will convert it into a preliminary injunction without change.

Order

AND NOW, June 28, 1971, the temporary restraining order of June 18, 1971, filed in the within case shall now constitute a preliminary injunction without change until further order of this Court.

BARRON P. McCUNE

United States District Judge

cc: LEONARD L. SCHEINHOLTZ, Esq.
HENRY J. WALLACE, JR., Esq.
DANIEL R. MINNICK, Esq.
LLOYD L. ENGLE, JR., Esq.
JOSEPH A. YABLONSKI, Esq.

*Appendix G.***History**

On April 15, 1971 at about 4:30 a.m. a roof fall broke an overcast in one of the intake air-ways of 5 face. This caused a reduction in the volume of air flowing to the No. 5 face. At about 7 a.m. a machine operator noticed that the coal dust wasn't moving away from the machine head in a normal manner which indicated some disruption in the flow of air. This was called to the attention of the Assistant Foreman, George Mosalovich, who took an air flow reading and discovered that the flow in his section had dropped to 11,000 cubic feet per minute. The normal flow measured at the start of the shift was about 28,000 cubic feet per minute.

Assistant Mine Foreman, Mosalovich reported the reduced air reading to the mine office and pulled the power in his section. Help was sent in to locate the problem. About 8 a.m. it was concluded that there was an obstruction or restriction in one of the main air courses. The power for the entire mine was cut and the day shift which had just entered the mine was ordered out. The broken overcast was discovered shortly afterward and was repaired. One of the members of the Safety Committee assisted in the repairs.

The Superintendent called both the federal and state mine inspectors to report the incident, but the evidence showed that neither of the inspectors felt it was necessary for them to come to the mine and make an immediate inspection. After the men had come back to work, one of the federal inspectors visited the mine but stayed on the surface.

During the company's preliminary investigation, it was noted that the state book appeared to be im-

properly filled out by three foremen being Mr. Mosalovich, Mr. Debreczeni, and Mr. Bartoshek. The company unilaterally suspended these three men pending a complete investigation by the coal company. The men returned to work on Monday April 19. In the meantime, State Mine Inspector, J. M. Hovanic, filed a criminal information against the three assistant mine foremen. At a magistrate's hearing several weeks later they were referred to a district attorney and on July 23, 1971 they pleaded "nolo contendere" and paid a \$200 fine each.

Complaint as to these three assistant foremen was also filed with the State Mine Department by the three members of the Safety Committee of the local union which had the power to decertify these men as assistant foremen. If this had been done by the Mine Department, these men could have no longer worked as assistant foremen. In answer to this complaint filed by the local union, Mr. David R. Maneval, Acting Deputy Secretary, for the State Department of Environmental Resources, wrote a letter to Mr. Joe Kreon, President of Local Union No. 6330, United Mine Workers of America dated May 26, 1971 which is quoted as follows:

"This will acknowledge receipt of a copy of a letter dated April 30, 1971 signed by Thomas O'Brochta, John Ozonish and Frank Ruthreford of the Safety Committee of Local 6330, United Mine Workers of America.

This letter involves an incident at the Gateway Mine of the Gateway Coal Company. Mine Inspector J. M. Hovanic of the 8th Bituminous District had, of course, previously reported this incident to me and I had discussed it with Deputy Secretary Dennis Keenan. Due to the information

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I have obtained and open discussions concerning this matter with Assistant Attorney General, Peter J. Dubinsky, I concur that the action taken by Mr. Hovanic to file information with the District Magistrate against Mr. Debreczeni, Mr. Masolovich and Mr. Bartosheck.

In view of the satisfactory record and good performance of these foreman in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal company is at liberty to return the three (3) assistant foreman to work if it so desires.

The objectives of the mining laws of this State is to enhance and assure mine safety. The penalty language in the Bituminous Mining Law was meant to penalize violators of the mining law to the extent deemed appropriate by the Judiciary. Other than the above noted action on the part of our District Inspector and the penalty imposed by the magistrate, we feel that sufficient action has been taken by the Commonwealth in this case.

One of the three foreman, Mr. Bartosheck had been preparing to retire after 35 years service and did retire prior to May 31, 1971. On May 31, 1971, the other two foremen, Mr. Mosalovich and Mr. Debreczeni were returned to their jobs as assistant foremen; and at midnight that night, the members of Local Union 6330 went out on strike. The company then filed suit in Federal Court seeking a temporary restraining order and a temporary injunction requiring the men to go back to work which resulted in the issuance of the two orders quoted herein by Federal Judge Barron P. McCune.

Union Contention

It is the position of the Union that safety is not an arbitratal matter. In this particular case if the Safety Committee had shut down the mine the next recourse, if any, provided by the contract is that the company may base a grievance upon the fact that the Safety Committee has acted arbitrarily and capriciously. The Company can thereby request the removal of the Safety Committee or a member of the Safety Committee. This request would be handled under the Grievance Procedure of the contract. Although the Company has not made any charge against the Safety Committee, the Union states that it feels the only issue which can be arbitrated in this hearing is whether or not the Safety Committee acted arbitrarily and capriciously.

Company Contention

The Company's position in this case is that the work stoppage was an illegal or unauthorized work stoppage. Even with the obstruction of one of the air vents, that the air movement of the mine never fell below the state and federal requirements, That the men were taken out of the mine as an extraordinary precaution while the overcast was being repaired. The three assistant foremen all had good records; and while it is admitted that they made an erroneous entry in the book, they did not do anything to endanger the lives of any of the men.

Further, the State of Pennsylvania had the right to decertify these men as assistant foremen. Upon a complete investigation, they declined to decertify these men as they felt they had not done anything to justify

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such action, that the fine they paid in the criminal procedure was ample punishment.

The Company sees the issue in this case as to whether or not the assistant foremen should be returned to work.

Safety

The Union's position in this hearing and also in federal court is that safety is not an arbitratal issue. This is partially true; but, like most general rules, there are exceptions as pointed out by Judge McCune in the preliminary injunction.

State and federal mine laws and regulations are administered by the proper state and federal agencies. These agencies are charged with the responsibility of making inspections. Under the relatively new Federal Safety Standards for Coal Mines, it is provided that an individual miner can report and request an inspection if he feels the safety regulations are being violated. This act further provides that the company cannot take any punitive action against the miner who reports an alleged violation and requests an inspection. Federal and state regulations as to safety require men who are trained in making these inspections and in the use of technical equipment and devices in making such investigations. Federal and state mine inspectors not only have the right to inspect and seek out violations but under the law also have the right to impose penalties and shut down a part or all of a mine if it deems necessary to the safety of the employees. An umpire has no such power. Therefore, the administration of the safety law and regulations is vested by law in the state and federal

mine departments and the enforcement thereof. These violations are not subject to arbitration.

There are matters respecting safety that are subject to arbitration. It has generally been held that if a miner is ordered to perform work at a place or with equipment that he can visibly ascertain as being so dangerous as to cause him serious injury or loss of life, he then has the right to refuse to carry out orders to perform such work. If the company undertakes to punish him, he can process a grievance through the Grievance Procedure of the contract.

Also, the contract contains provisions regarding the duties of the Safety Committee and any dispute involving this section of the contract is subject to arbitration, as specifically pointed out by Judge McCune. The first three paragraphs of the MINE SAFETY COMMITTEE provision state as follows:

At each mine there shall be a mine safety committee selected by the local union. The committee members while engaged in the performance, shall be paid by the local union. When the mine safety committee is making an investigation of an explosion and/or a disaster, they shall be paid by the company at their regular rate of pay for the hours spent making such investigation, provided there is not a more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation law of the state where such duties are performed.

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The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

The above quoted provision of the contract allows the Safety Committee to inspect the mine and equipment; and any conditions that would endanger the life and bodies of the mine workers can be reported by the Committee to management with recommendations for the elimination of the dangerous conditions. If the Company did not follow these recommendations, the committee could report the dangerous conditions to the state or federal mine officials and request action on their part. The section goes on to provide that where the committee believes an *immediate* danger exists, then the committee has the duty and the power to recommend management remove all mine workers from the unsafe

area. The operator is required to follow these recommendations. In this case, however, the danger must be immediate to the life and bodies of an employee or employees. In this provision, in order to protect the company from using these powers unjustly, it is provided that if it is found that the Safety Committee is acting arbitrarily and capriciously that such members may be removed from the committee. If the local does not remove them from the committee, a grievance can be filed by the Company and an umpire can require that the Safety Committee member or members be removed from the committee.

In the present case, the evidence does not show an immediate danger to the life or body of the miners existed. When the interruption of air became apparent, one section was closed down by the assistant mine foreman Mosalovich; but when the fan chart was brought to the attention of the Superintendent, all of the miners were pulled out of the mine by management as a safety precaution. At no time were the miners in immediate danger to their life or bodies as a result of this mishap in the air circulation system.

When the miners went out on strike in protest against the two assistant foremen, Mosalovich and Debreczeni, any part played by the Safety Committee in this strike was arbitrary and capricious on the part of the committee.

Assistant Foremen

The miners claim that they went out on strike because they were afraid to work under the direction of two assistant foremen, Mosalovich and Debreczeni. The acts of these two foremen were such that it de-

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stroyed the confidence of the miners working under these foremen, and they felt that their life and bodies were in danger because these foremen were not qualified to safely fulfill their position as assistant foremen in the mine. It was shown and not denied that these assistant foremen had made an erroneous entry in the mine book regarding the flow of air after the fall in the overcast. A great deal of the evidence introduced by the Union was to the effect that 3 or 4 years ago, the men working under Mosalovich had made an illegal electrical splice generally referred to as a West Virginia splice. The West Virginia splice is the connecting together of cables by nailing the ends together on a board and leaving the live wires exposed. The umpire cannot seriously consider this evidence as this condition occurred 3 or 4 years before the fall in the overcast and they knew of the condition. In fact, they had a hearing in the union hall about the splice but continued to work with this man without objection for a period of 3 or 4 years. If the act of Mosalovich in allowing this splice was such that it would disqualify him as a foreman, the men would not have waited 3 or 4 years to be concerned.

The entry in the mine book was erroneous and admitted so by the two men, and it was a mistake on their part. The umpire is more concerned with their acts than with the erroneous entry in the mine book. Assistant Foreman Mosalovich was one of the first to discover that there was a reduction in the air in his section and he closed his section down, and he pulled the power at approximately 7:10 a.m. which showed good judgment on his part and that he was well aware of the precautions to be taken for the safety of himself and his men. When the fan chart was brought in to the Super-

intendent at about 8 a.m. or shortly after which showed a reduction or interruption in the air flow at 4:25 a.m., the Superintendent then ordered the entire mine closed and the men brought out of the mine. The necessary repairs were made and the mine was back in working operation again around 10:30 or 11 a.m.

The company introduced evidence that this was an exceptionally safe mine. The union's evidence tended to contradict the claimed safety conditions in the mine. Through all of the evidence, it appears that this mine was operated at an average or above average safety level. The evidence showed that although the men were brought out of the mine as a safety precaution, the air circulation never dropped below the state or federal minimum requirements and no danger of an explosion existed. There were methene gas indicators at various places in the mine, one being on the mining machine at the No. 5 face; and at no time did it ever indicate the presence of even over 1% of methene gas in the mine.

The evidence introduced by the company showed the two assistant foremen questioned showed that they had completed the proper studies, passed the examinations required to fulfill their positions, and, in addition, they had taken additional courses in maning and safety. The only charge brought against them was their mistake in making an erroneous entry in the mine book which they admitted was a mistake and the West Virginia splice had been made by the workers under Mosalovich 3 or 4 years previous to this occasion. "From the number of years these men had worked in the mines, it is unusual to find formen or miners who have not made more mistakes or errors in judgment than the ones accessed against these two men. The umpire feels that

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the record of these two men is as good or better on the average of mine foremen in general. The employees of this mine did not have good cause to go out on strike and the strike was an unauthorized work stoppage.

The Pennsylvania State Department of Environmental Resources after an investigation refused to decertify the two foremen Mosalovich and Debreczeni. Although they had the power to do so if they felt such action was proper, they did not. In the letter stated above from the Acting Deputy Secretary, it was stated in view of the good performance of these men in the past that no further action should be taken against the foremen. A criminal information was filed against the foremen by a state mine inspector and they each paid a fine. The Pennsylvania Mine Department felt that this was sufficient punishment to the foremen to which the umpire agrees.

Under the MANAGEMENT OF MINES clause of the contract, it is stated: "The management of the mine, direction of the working force, and the right to hire and discharge are vested exclusively in the Operator . . ." To allow the employees by an unauthorized strike to cause management to fire two of the management employees would be taking away from management their most necessary and important right under the contract, and in effect to be allowing the employees to begin to take over the function of management of the mines. The two assistant foremen Mosalovich and Debreczeni are still certified, qualified assistant foremen, and management has the right to hire and use these men so long as they are qualified assistant foremen, under the laws of the State of Pennsylvania to fulfill the position of assistant foremen without interference from the employees.

Order

The umpire finds:

1. The Safety Committee acted arbitrarily and capriciously, Since the Company had not filed a complaint or asked that the men on the Safety Committee be removed, the Umpire cannot order their removal.

2. The position of the employees in refusing to work with the foremen Mosalovich and Debreczeni is unfounded. The Company is allowed to place these men back as assistant foremen without interference from the employees.

This September 2, 1971.

L. D. MAY
Umpire

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. **72 - 782**

GATEWAY COAL COMPANY, *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT No. 4,
UNITED MINE WORKERS OF AMERICA; LOCAL No. 6330,
UNITED MINE WORKERS OF AMERICA, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE BITUMINOUS COAL OPERATORS' ASSOCIATION,
INC., AMICUS CURIAE

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Association, Inc.





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UNITED MINE WORKERS OF AMERICA, *Respondents*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Bituminous Coal Operators' Association, Inc., herein called BCOA, respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the Petition for Certiorari in this case.

BCOA is an incorporated association of Coal Operators. Its members produce about 65 percent of all

bituminous coal produced in the United States and the vast majority of the coal produced by signatories to the National Bituminous Coal Wage Agreement. BCOA negotiates the agreement with the United Mine Workers on behalf of its members, and takes a major role in the interpretation and implementation of the agreement. BCOA is also the major national spokesman and representative of the industry in health and safety matters.

The decision of the Third Circuit Court of Appeals in the *Gateway Coal Company Case* directly affects both the labor agreement and safety. The decision purports to interpret the 1968 Wage Agreement and improperly holds that safety grievances are not arbitrable. While the 1971 Agreement has since superseded the 1968 Agreement and contains some special provisions relating to health and safety issues, there is no question that safety grievances have always been subject to arbitration under the prior agreements.

If it is to be held that safety grievances are not arbitrable and that employees may freely engage in wild-cat strikes over such grievances, BCOA foresees chaotic labor conditions in the coal industry. The consequent loss of production would seriously endanger the Nation's supply of coal.

The decision of the court below thus infringes directly upon the BCOA's two major concerns—stability of labor relations and health and safety. BCOA, therefore, has a direct and substantial interest in the outcome of this proceeding.

BCOA has attempted to obtain consents to the filing of this brief, but has obtained a consent from one party only.

WHEREFORE, BCOA moves the Court to allow the filing of the Brief, *Amicus Curiae*, which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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Petition for a Writ of Certiorari to the United States Court of
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BRIEF OF THE BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC., AMICUS CURIAE

INTEREST OF THE BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.

The Bituminous Coal Operators' Association, Inc.,¹ is a voluntary non-profit association of bituminous coal mine operators. It was born in 1952 out of an effort to bring a degree of stability out of the labor-management relations chaos that had long characterized the coal industry. Since that time, BCOA has continued to exist

¹ Hereinafter referred to as BCOA.

for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry.

BCOA membership is open to any bituminous coal company that is a signatory to the National Bituminous Coal Wage Agreement. The membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA is the primary industry instrument for the negotiation and interpretation of the National Bituminous Coal Wage Agreement. During the term of the labor agreement, BCOA functions as an industry representative in the relations between the United Mine Workers and the various coal company members of BCOA. BCOA has also long been the chief industry spokesman and representative on matters of health and safety.

BCOA, therefore, has a continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields.

The decision of the court below will drastically weaken the efficacy of the contract grievance-arbitration procedures and will adversely affect the interests of BCOA and all its membership. It impinges directly and disastrously on BCOA's two major concerns—the stability of employment under the agreement and health and safety.

STATEMENT OF THE CASE

This Brief, *Amicus Curiae*, is addressed to the Petition of Gateway Coal Company for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

The Court of Appeals in a two to one decision reversed the judgment of the District Court and vacated a preliminary injunction which had been issued against Respondents for engaging in a strike over an alleged safety dispute. The preliminary injunction had been issued under the authority of the decision of the Court in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

Petitioner, Gateway Coal Company, is a member of the BCOA and is a signatory to the National Bituminous Coal Wage Agreement. The employees at the mine are represented by a local of the United Mine Workers of America, also signatory to the National Wage Agreement. BCOA negotiates and assists in interpreting this agreement.

This agreement contained a broad grievance and arbitration provision, providing for the settlement of all local disputes of any kind.

The Gateway mine, located in Greene County, Pennsylvania, is a large underground mine employing about 550 miners.

On April 15, 1971, there was a reduction of airflow in the mine, which was discovered by a foreman. However, the airflow was still above that required by the Federal Coal Mine Health and Safety Law. Nevertheless, mine management withdrew the day shift from the mine and sent in a special crew to locate and repair the malfunction. The repairs were made by mid-morning

and part of the crew returned to work for the remainder of the shift. Although instructed to stand by as provided in the labor agreement a part of the day shift crew went home and did not work on the shift.

A dispute then arose because of the refusal of the day shift crew to work the following day unless they received reporting pay. The Company offered to arbitrate the issue but the day shift struck and were joined by the men on the second and third shifts.

While inspecting the mine, the inspectors found, however, that three third shift assistant foremen had failed to make certain log book entries as required by federal regulations. The Company suspended two of the three foremen, but did not suspend the third because he had in fact reported the trouble.

The local union then voted to remain on strike unless the third foreman was also suspended from work.

Subsequently, on May 29, the Company was advised in writing by the Pennsylvania safety authorities that the foremen could be returned to work. The two suspended men were then reinstated.

The local union continued the strike.

The District Court issued a temporary restraining order against the strike on June 18, and a preliminary injunction on June 28.

The District Court found that the dispute over the suspension of the foremen was an arbitrable grievance under the labor agreement. The Court further ruled, however, that, since the Union claimed that the presence of the foremen in the mine was a safety hazard, the assistant foremen should be suspended "until an impartial umpire has determined whether these men

should return to work." The Court further ordered that the parties proceed to arbitrate the dispute.

The dispute was arbitrated and, on September 2, 1971, the impartial umpire rendered his decision and award. He ruled that the dispute was arbitrable; that the refusal of the miners to work with the assistant foremen in question was unfounded because their presence in the mine would not render it unsafe; that the strike was without justification; and that the local union should not interfere with the reinstatement of the suspended foremen. Under the agreement, this award was final and binding on all parties.

Meanwhile, the Union had appealed the preliminary injunction to the Third Circuit Court.

On July 18, 1972, the court below reversed the District Court and dissolved the preliminary injunction.

The court below held that a safety dispute is "*sui generis*" and, consequently, not subject to the strong federal policy favoring arbitration of "the ordinary types of labor disputes." The dispute, the Court postulated, was not arbitrable, and as a consequence *Boys Markets* did not apply. The court reasoned that the labor agreement did not explicitly make "safety" disputes arbitrable, and because safety disputes are unique, should not be construed to encompass them. The court expressly refused to pass on whether it would hold otherwise "in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration..." (Footnote 1 to majority opinion).

The court stated flatly that:

"If employees believe that correctible circumstances are unnecessarily adding to the normal

dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." Opinion, p. 5.

Judge Rosenn dissented. He pointed out that there was a serious question whether the strike was because of a safety issue, since it started over the refusal of the Company to pay the men who went home on April 15.

Judge Rosenn held that the decision of the majority placed in the hands of an employee or group of employees the sole and unreviewable power to label another employee a working hazard and engage in a refusal to work and cause other employees unaffected by the issue to strike. He found that the majority decision ran "directly counter to our national labor policy of promoting labor stability" and opened "new and hazardous avenues in labor relations for unrest and strikes." Opinion, p. 10.

Judge Rosenn further found that the majority had misapprehended § 502 of the Labor-Management Relations Act, holding that provision does not oust arbitrators or courts from jurisdiction or prohibit courts from compelling arbitration of a safety dispute. He cited court authority for the proposition that when a union raises § 502 as a justification for a work stoppage, it must present "objective evidence" that an abnormally dangerous condition does in fact exist. Opinion, p. 9. In this regard, he thought it conclusive that the District Court had in its order forbade the foremen to return to work pending resolution of the dispute. Opinion, p. 11. By thus conditioning the injunction,

the national policy could be carried out without possibly endangering the safety of employees.²

The order of the court below, Judge Rosenn pointed out, accomplished nothing. It merely restored the parties to the impasse which confronted them in June 1971, with no apparent means of resolution other than self-help.

The Third Circuit has since applied its ruling in *Gateway* in another case arising under the 1968 Coal Wage Agreement at the Maple Creek Mine of United States Steel Corporation. In that case, the Union struck the mine over an alleged failure of a shift foreman to "show the proper concern for mine safety."

The court below in a *per curiam* opinion set aside a preliminary injunction issued by the District Court. The court below stated that *Gateway* held that the 1968 agreement did not bar miners from striking over safety disputes. The *per curiam* opinion characterized *Gateway* as holding that "it is the miners themselves who should make the determination as to what constitutes a safety hazard."

² The court below ignored two other significant safeguards which are available to protect the miners from job hazards. The 1968 Coal Wage Agreement contains a provision which establishes a Mine Safety Committee of miners and empowers it to inspect any area of the mine; and, if the Committee finds that danger is imminent, and so informs the mine operator, the operator is required to remove all miners from the allegedly unsafe area. The same provision appears in the 1971 agreement. Art. III, § (g). See Appendix, p. 7a. Additional safeguards appear in the Federal Coal Mine Health and Safety Act of 1969. § 103(g) provides for an immediate inspection upon the request of the miners' representative; and under § 104(a) the mine inspector is empowered to issue an immediate withdrawal order if he finds that an imminent danger exists. 30 U.S.C. §§ 813(g), 814(a).

The *per curiam* opinion was joined in by three judges: Judge Gibbons, Judge Rosenn who had dissented in *Gateway* but felt bound, and Judge Layton who also felt bound but indicated his disagreement with the decision. *U. S. Steel Corp. v. UMW, et al.*, F.2d , 81 LRRM 2646 (3d Cir. 1972).

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT BELOW WILL ENCOURAGE INSTABILITY AND UNREST IN THE COAL INDUSTRY

The decision of the court below will do incalculable harm to labor stability in the coal industry and seriously impair the ability of BCOA members to produce an adequate supply of fuel to meet the Nation's needs.

The grievance and arbitration provisions of the National Bituminous Coal Wage Agreement have long been among the most liberal in industry in terms of their breadth and scope. Thus, for many years, the coal agreements have opened up to grievance and arbitration almost any conceivable local issue or trouble that might arise. The grievance and arbitration provisions are phrased so as to encompass any "differences" between the mine workers and the employer "as to the meaning and application of the provisions of this agreement," or any "differences . . . about matters not specifically mentioned in this agreement" or "any local trouble of any kind." See Appendix, pp. 1a, 2a.

There is no question that the tradition and practice in the coal industry has long been to give the widest scope to grievance-arbitration. It is also beyond question that for many years health or safety disputes could be heard under these procedures. This was true even

before the last negotiations in 1971 when the parties, in response to the growing concern for health and safety in the mines, went even further and devised a separate and specially designed procedure for handling health and safety grievances. See Appendix, pp. 4a-9a. Long before this, however, safety grievances were heard under the general provisions for settling local disputes.

BCOA is gravely concerned about the potential impact of the decision of the court below on the stability of labor relations in the coal mining industry. The decision, if allowed to stand, will deal a staggering blow to BCOA's hopes of achieving coal miner acceptance of peaceful procedures for resolving disputes and grievances of all types.

The decision of the court below carves out all safety disputes or grievances and labels them "*sui generis*" and non-arbitrable. The court below quite literally holds that "safety" grievances are not subject to arbitration, and that strikes labeled unilaterally by an employee, a group of employees or a union as "safety" strikes are not enjoinable. The necessary effect of this ruling is to relegate all safety disputes to a no-man's land beyond the reach of arbitrators or courts. This ruling opens the door to self-help, rampant wildcat strikes, and chaos in the coal mining industry.

As dissenting Judge Rosenn so aptly said:

"If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy

of 'wildecatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." Opinion, pp. 9-10.

The references by Judge Rosenn to "wildecatters," "unrest" and "strikes" is especially apt in the coal industry. The coal mining industry has the worst record by far of any major industry in production lost and wages lost due to wildec strikes over individual grievances, frequently minor in nature, which could have been resolved under the contract procedures for settling disputes. In 1971, alone, 565,827 man days, 8,962,062 tons of production and \$21,981,476 in wages to coal miners were lost due to wildec strikes. Since the payments to the local miners' welfare and pension trust are based on a royalty on coal produced, these wildec strikes resulted in a loss of approximately \$3,740,000 to the welfare and pension fund.

Although BCOA sees a ray of hope in the fact that coal miners are beginning to utilize the contractual grievance-arbitration procedures with more frequency, the decision of the court below can only encourage a higher incidence of resort to wildec strikes.

The present decision comes at a time when greater labor stability and continuity of production are essential if the coal industry is to meet its share of the Nation's growing energy needs.

In bringing about greater awareness among coal miners of the availability of expeditious and just grievance-arbitration procedures and the need to utilize them as an alternative to the wildec strike, the decisions of this Court in the *Steelworkers Trilogy*

(strengthening arbitration); in *Local 174, Teamsters v. Lucas Flour*, 369 U. S. 95 (1962); and *Boys Markets* (enforcing the obligation to arbitrate rather than strike) have played an important, indeed an essential, role. In case after case that has arisen, the courts, in reliance on these decisions, have begun to channel miner grievances into the peaceful channels of arbitration under the agreement. The lessons are hard to learn but they are beginning to take hold.

It is a notorious fact that throughout the coal producing regions, the mere presence of a single picket at a coal mine has long been enough to signal a complete shut down of the mine; and "roving pickets" have long followed a familiar pattern of going from mine to mine shutting them down one by one because of a single grievance at a particular mine that could be readily resolved by peaceful arbitration.

Old habits are hard to break, and the wildcat strike as a way of life in the coal regions has deep roots in the past. It will take the combined efforts of the employers, the Union at all its levels, the employees and the arbitrators and courts to bring about a gradual acceptance by the miners of the amelioratory course of impartial arbitration. *Boys Markets* teaches that, where there exists a contract and machinery for the final and binding resolution of grievances and disputes, a promise is implied on the part of the management, the union, and the employees, that they will utilize those procedures rather than resort to self-help, the lockout or the strike. The lower courts have, in numerous decisions, held that *Boys Markets* applies to the National Bituminous Coal Wage Agreement, and certainly there is no industry in which the aid of the courts to achieve labor peace is more urgently needed. Unquestionably, with-

out *Boys Markets*, chaos and the law of the jungle will continue to hold sway in the coal industry.

The court below has, as Judge Rosenn so clearly saw, created a unique legal interpretation which provides a ready escape from *Boys Markets*. All that an individual or group, pursuing his or their own selfish motives, need do is advance a specious grievance, label it a "safety issue," mount a wildcat strike, and the dispute would be non-arbitrable and the courts would be powerless to intervene. That is, incredibly, the ruling of the court below.

This case was decided under the prior 1968 agreement. It is noted that the 1971 agreement contains a special grievance-arbitration procedure for resolving health or safety disputes. However, the provision for the settlement of local disputes in the 1968 agreement was exceedingly broad, and encompassed safety disputes as well as all other local disputes of any kind.

The court below states that *Boys Markets* is inapplicable because that decision is grounded on a finding that the dispute in question is subject to compulsory arbitration under the labor agreement. The Court then postulates that "safety" disputes are not subject to arbitration under the National Bituminous Coal Wage Agreement.³ This assumption is totally unwarranted in fact or law. This type of dispute has always been arbitrated under the Coal Wage Agreement.

³ The court below stated in a footnote:

"It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoined." Opinion, p. 6. The 1971 agreement contains precisely such a provision, and, even before that, there was never any question that safety disputes were arbitrable under the general arbitration clause of the agreement.

The decision of the court below offers no alternative to arbitration or to application of *Boys Markets*. It repeals *Boys Markets* for safety disputes and unleashes employees and unions and employers to take matters into their own hands, to strike, to lockout and to create economic havoc over any safety issue, real or imagined. But the decision below offers no alternative means of settlement or resolution of the underlying dispute either by arbitration or by court adjudication. This invitation to the law of the jungle in a critical area of labor-management relations—health and safety—is in open and direct contradiction to the national policy as expounded by this Court of encouraging resort to arbitration to resolve all types of grievances and labor-management disputes.

The court below has decided two fundamental issues contrary to the policies of this Court. They are:

- (1) That a wildcat strike is not enjoined under *Boys Markets* if it purports to be over a safety issue; and
- (2) That a safety issue is *sui generis* and not arbitrable under a broad grievance-arbitration clause.

The court, indeed, went so far as to brush aside the fact that this particular dispute was in fact arbitrated under the Order of the District Court between the dates of issuance of the preliminary injunction and the decision of the Appellate Court. Moreover, the impartial umpire mutually selected by the parties held that there was no safety hazard to the employees. The decision of the court below had the effect of nullifying the arbitrator's decision, again in opposition to basic principles established by this Court.

It is no exaggeration to describe this decision as an invitation to chaos in the coal industry.

**B. THE DECISION OF THE COURT BELOW CONFLICTS WITH
FUNDAMENTAL PRINCIPLES OF LABOR LAW AND POLICY
ESTABLISHED BY THE COURT**

The Court has made it clear time after time that nothing is more basic to the national labor policy than the principle of strongly favoring arbitration against stalemate and self-help in resolving labor-management disputes.

The decision of the court below conflicts directly with every facet of that policy, and, in a broad spectrum of disputes—those involving safety—literally stands that policy on its head.

The decision of the court below, therefore, while of immediate concern to the coal industry, has a broader impact on industry at large. With the growing concern for safety and the proliferation of legislation and regulation in this field, the carving out of all safety issues from arbitration under labor agreements will create a vast no-man's land where only the primitive weapon of trial by combat prevails.

**1. The Decision of the Court Below Runs Directly Counter
to the Steelworkers Trilogy.**

In the three landmark cases decided by the Court in 1960, the Court created a strong presumption favoring arbitration of grievance disputes. *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960). In effect, the Court held that where there exists an arbitration provision, all disputes are arbitrable unless specifically excluded from arbitration. As the Court

stated in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583 (1960):

“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

Nothing could be more plain than that. But here the court below applied the opposite presumption. The court said that safety disputes are not arbitrable under the broadest type of arbitration clause because it was not “particularly stated nor unambiguously agreed in the labor contract that the parties shall submit safety disputes to binding arbitration. . .” Opinion, p. 5.

Indeed, the court hinted very strongly that it would not require arbitration of safety grievances even if the parties expressly so agreed.⁴

2. The Decision of the Court Below Conflicts Directly with *Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960).

This decision forbids the courts to tamper with an arbitrator's award or his jurisdiction over the controversy unless the award is tainted by fraud or clearly antithetical to the agreement of the parties. As the Court said in *Enterprise*,

“It is the arbitrator's construction which was bargained for, and so far as the arbitrator's deci-

⁴ The decision of the court below conflicts broadly with the decision of the Eighth Circuit Court of Appeals in *Hanna Mining Co. v. Steelworkers*, F.2d , 80 LRRM 3268 (8th Cir. 1972). The opinion in the *Hanna* case distinguishes the *Gateway* decision on the facts, but it is clear that the two court decisions are in basic conflict in principle.

sion concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U. S. at 599.

Here, the court below in a collateral attack on the arbitrator's award has not only ignored the admonition of the Court in the *Steelworkers Trilogy*, it has in effect set aside the arbitrator's award and substituted its own contrary interpretation of the labor agreement.

3. The Decision of the Court Below Conflicts Directly with the Decision of the Court in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

The Court in *Boys Markets* reversed *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962), and held that a federal court may enjoin a strike over an arbitrable grievance. *Boys Markets* cannot be viewed in isolation. It is part and parcel of the national policy of encouraging resort to peaceful arbitration rather than economic warfare to settle labor disputes.

The District Court in this case applied *Boys Markets* and ordered arbitration of the dispute. The strike was enjoined in the interim under terms that fully protected employees from any possible hazard to their safety. The arbitrator heard the case and found no hazard to exist.

The court below found that *Boys Markets* did not apply because the dispute was a safety dispute and therefore not arbitrable. The injunction was vacated and the arbitrator's award nullified. The parties were presumably left to their own devices with future prospects for finding peaceful means of adjusting safety disputes by arbitration being apparently foreclosed. A more negative and sterile doctrine can scarcely be imagined.

4. The Decision of the Court Below Conflicts Directly with the Uniform Interpretation of § 502 of the Labor-Management Relations Act.

To bolster its unique view that "safety" issues are by their very nature not arbitrable, the court below called upon its interpretation of § 502 of the Labor-Management Relations Act. This Section provides that when employees in good faith quit work because of abnormally dangerous conditions, it shall not be deemed a strike. The court further reasoned that if a union honestly believes a safety issue exists it has satisfied its burden under § 502.

The argument is faulty in two major respects. First, as Judge Rosenn pointed out, the uniform interpretation of § 502 has been that to justify a walkout over unsafe conditions of work, the union must present ascertainable, *objective* evidence that an abnormally hazardous condition did in fact exist. See *Philadelphia Marine Trade Association v. NLRB*, 330 F. 2d 492 (3d Cir. 1964), *cert. denied*, 379 U.S. 833, 941; *NLRB v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. denied*, 357 U. S. 927; *Redwing Carriers, Inc.*, 130 NLRB 1208 (1961), *enf'd as modified*, 325 F. 2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905.

Second, even if a temporary cessation of work might be justified by objective evidence of abnormal danger, there is nothing in § 502 to suggest that a safety dispute is not a proper subject for arbitration. If an honest difference of opinion exists, some mechanism must be found for its peaceful resolution. Arbitration is the means that the parties here have chosen. The decision of the court below denies them that peaceful and time honored avenue and leaves them to their own devices.

CONCLUSION

BCOA submits that the decision of the court below is a major retrogressive step which, if not reversed, will create chaos and confusion throughout the coal fields. The proposition of law it expounds is retrogressive and dangerous. Its adverse impact on labor relations in the coal fields is immediate and apparent; and its philosophy and rationale present a clear and present danger to peaceful labor relations in the coal industry on a national scale.

BCOA respectfully urges the Court to grant the writ so that this issue may be reviewed on its merits.

Respectfully submitted,

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APPENDIX

Provisions in the 1968 National Bituminous Coal Wage Agreement for Settlement of Local and District Disputes

Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

1. Between the aggrieved party and the mine management.
2. Through the management of the mine and the mine committee.
3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.
4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.
5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an

umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

Article XVII. Provisions in the 1971 National Bituminous Coal Wage Agreement for Settlement of Disputes

Section (a) Mine Committee

A committee of three employees shall be elected at each mine by the employees at such mine. Each member of the mine committee shall be an employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this agreement that the mine management and the employee or employees have failed to adjust. The mine committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee. (1941)

Section (b) Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time. (The parties will not be represented by legal counsel at any of the steps below.):

(1) By the aggrieved party and his foreman who shall have authority to settle the complaint. Any grievance which

is not filed by the aggrieved party within fifteen calendar days after he reasonably should have known of such grievance shall be considered invalid and not subject to further prosecution under the grievance machinery.

(2) If no agreement is reached, the grievance shall be taken up by the mine committee and the mine management within five calendar days of the conclusion of step 1. A standard grievance form shall be completed and jointly signed by the parties to the grievance. Such a form will be agreed upon by the parties.

(3) If no agreement is reached, the grievance shall be taken up by the UMW district representative and a designated representative of the Employer within ten calendar days of the conclusion of step 2.

(4) If no agreement is reached, the grievance shall be taken up by the Board within ten calendar days of the conclusion of step 3 or in discharge cases within five calendar days of notice of appeal. The Board shall consist of four members, two of whom shall be designated by the Union and two by the Employer. Neither the Union's representatives on the Board nor the Employer's representatives on the Board shall be the same persons who participated in steps 1, 2, or 3 of this procedure.

(5) Should the Board fail to agree the matter shall, within ten calendar days after decision by the Board, be referred to an umpire who shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and fees incident to the services of an umpire shall be paid equally by the Employer or Employers affected and by the Union.

The grievant shall have the right to be present at each step, if he so desires, of the foregoing procedures until such time as all evidence is taken. A decision reached at any stage prior to step 5 of the proceedings above outlined shall be reduced to writing and signed by both parties. The

decision shall be binding on both parties and shall not be subject to reopening except by mutual agreement.

Section (c) Joint Committee on Arbitration Procedure

A committee of equal representation from the Employers and the Union will be appointed immediately after the execution of this agreement to study the feasibility of a permanent or chief umpire and/or a panel of umpires to arbitrate disputes which may arise under the terms of the agreement.

The committee will examine methods of selection, tenure, compensation and related matters and will complete its report and recommendations no later than April 1, 1972.

Article III. Provisions in the 1971 National Bituminous Coal Wage Agreement for Health and Safety

Section (a) Federal Coal Mine Health and Safety Act of 1969

The parties to this contract, finding themselves in complete accord with the FINDINGS AND PURPOSE declared by the United States Congress in section 2 of the Federal Coal Mine Health and Safety Act of 1969 do hereby affirm and subscribe to the principles as set forth in such section of the act.

(1) In consequence of this affirmation the parties not only accept their several responsibilities, obligations, and duties imposed by the Federal Coal Mine Health and Safety Act, but freely resolve to cooperate among each other and with the responsible officials of federal and state governments in determined efforts to achieve greatly improved performance in coal mine health and safety.

(2) Neither party waives or repudiates any administrative, procedural, legislative, or judicial rights under or relating to the Federal Coal Mine Health and Safety Act of 1969.

Section (b) Mine Safety Code

The Federal Mine Safety Code for Bituminous Coal and Lignite Mines of the United States, Part I—underground mines, and Part II—strip mines, promulgated and approved October 8, 1953 by the Secretary of the Interior is hereby adopted and incorporated by reference in this contract as an additional code for health and safety in bituminous and lignite mines of the parties of the first part. Provided, however, if such provisions of the October 8, 1953 Code as they exist on October 1, 1971 or during the period of this agreement become superseded, nullified or rendered void as a consequence of any provision of the act, they are no longer in effect as Code provisions.

Section (c) Code Enforcement

(1) Reports of the federal coal mine inspectors: Whenever inspectors of the United States Bureau of Mines, in making their inspections in accordance with authority as provided in the Federal Coal Mine Health and Safety Act of 1969 find there are violations of the Federal Mine Safety Code and make recommendations for the elimination of such noncompliance, the operators shall promptly comply with such recommendations, except as modified in subsection (2) of this section.

(2) Whenever either party to the contract feels that compliance with the recommendations of the federal mine inspectors as provided in subsection (c)(1) hereof would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Industry Health and Safety Committee as provided in section (e).

Section (d) Review and Revision

In order to carry out the intent and purposes of the agreement as expressed in section (a) hereof, it is agreed that duly designated representatives of the Union and the

Employers shall seek joint consultations with the United States Bureau of Mines and/or designated representatives of the Secretary of Health, Education, and Welfare looking toward review and appropriate development and revision of improved mandatory health and safety standards as provided in section 101 of the act. They may seek such joint consultations with the United States Bureau of Mines for discussion of the technical aspects of petitions by the Employer or the Union as provided in section 301(c) of the act.

*Section (c) Joint Industry Health and
Safety Committee*

There is hereby established under this agreement a Joint Industry Health and Safety Committee composed of six members, three of whom will be appointed by the Union with one of the three having special knowledge and expertise in coal mine health matters, and three of whom will be appointed by the Employers with one of the three having special knowledge and expertise in coal mine health matters. The duties of this committee shall be to: (1) arbitrate any appeal which is filed with it by any Employer or any employee who feels that any reported violations of the Code and recommendation of compliance by a federal coal mine inspector pursuant to subsection (c)(1) herein has not been justly reported or that the action required of him to correct the violation would subject him to irreparable damage or great injustice; (2) consult with the United States Bureau of Mines and/or representatives of the Secretary of Health, Education, and Welfare in accordance with the provisions of section (d) hereof; and (3) function as prescribed in subsection (h)(4) hereof.

Section (f) Mine Health and Safety Committee

At each mine there shall be a mine health and safety committee made up of miners employed at the mine who are qualified by mining experience or training and selected

by the local union. The local union shall inform the Employer the names of the committee members. The committee members while engaged in the performance of their duties, with the following exception, shall be paid by the local union: When the mine health and safety committee is making or participating in an investigation of an explosion and/or a disaster including any mine fatality, they shall be paid by the Employer at their regular rate of pay (including any applicable premium rates) for the hours spent making or participating in such investigation, provided there is not a more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the applicable workmen's compensation law.

Section (g) Mine Health and Safety Committee Inspections

(1) The mine health and safety committee may inspect any portion of a mine and surface installations connected therewith. If the committee believes conditions found endanger the lives and bodies of the employees, it shall report its findings and recommendations to the Employer. In those special instances where the committee believes an imminent danger exists and the committee recommends that the Employer remove all employees from the involved area, the Employer is required to follow the recommendations of the committee.

(2) While making inspections, the mine health and safety committee shall be accompanied by a representative of the Employer.

(3) If the mine health and safety committee in closing down an area of the mine acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the health and safety committee under this section shall be handled in accordance

with the provisions of article XVII entitled "Settlement of Disputes."

(4) The mine health and safety committee and the Employer shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the agreement as may be required, and copies of all reports made by the mine health and safety committee shall be filed with the Employer.

Section (h) Settlement of Health or Safety Disputes

When a dispute arises at the mine involving health or safety, an immediate, earnest and sincere effort shall be made to resolve the matter through the following steps:

- (1) By the mine management and the mine health and safety committee.
- (2) By the United Mine Workers of America district safety coordinator or an alternate designated by the United Mine Workers of America Safety Director and a representative designated by the Employer. Failing to resolve the issue, they shall immediately call in for consultation a representative of the United States Bureau of Mines and/or the appropriate state agency in a further attempt to resolve the issue.
- (3) By the United Mine Workers of America Safety Director or his representative and a representative designated by the Employer.
- (4) By the Joint Industry Health and Safety Committee which for the purposes of this step shall employ a special structure and procedures as set forth below:
 - (A) The six regular committee members shall select a neutral chairman having special knowledge in matters of coal mine health

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and/or safety. The selection must be made immediately following referral of a dispute. The regular committee shall adopt procedures that will insure such timely selection.

- (B) The neutral chairman and either four or six regular members equally representing the United Mine Workers of America and the Employers shall constitute a quorum. When a dispute involves health issues, two of the regular members must be those designated in section (e) hereof who have special knowledge and expertise in coal mine health matters.
- (C) Decisions shall be reached not later than five days following referral to the committee. Such decisions shall be by majority vote and shall be binding upon the parties involved in the dispute.
- (D) Costs of the neutral chairman shall be borne equally by the parties.

Section (i) Safety Rules and Regulations

Reasonable rules and regulations of the Employer, not inconsistent with federal and state laws, for the protection of the persons of the employees and the preservation of property shall be complied with. (1941)

Section (j) Physical Examination

Physical examination, required as a condition of or in employment, shall not be used other than to determine the physical condition or to contribute to the health and well-being of the employee or employees. The retention or displacement of employees because of physical conditions shall not be used for the purpose of effecting discrimination. (1941)

Section (k) Engineer and Pumper Duties

When required by the Employer, engineers, pumpers, firemen, power plant and substation attendants shall under no conditions suspend work but shall at all times protect all the Employer's property under their care, and operate fans and pumps and lower and hoist persons or supplies as may be required to protect the Employer's coal mine and other related facilities. (1941)

Section (l) Minimum Age

No person under 18 years of age shall be employed inside any mine nor in hazardous occupations outside any mine; provided, however, that where a state law provides a higher minimum age, the state law shall govern. (1941)

Section (m) Safety Equipment and Protective Clothing Allowance

Safety equipment and devices, including electric cap lamps, shall be furnished by the Employer without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. (1945) In lieu of supplying such personal wearing apparel, the Employer shall pay each employee an annual protective clothing allowance. The protective clothing allowance will be \$10 effective November 12, 1972 and \$20 effective November 12, 1973. The allowance will be paid to each employee with the first payment of wages to which he is entitled following the effective date of the allowance.

Section (n) Workmen's Compensation and Occupational Disease

Each Employer who is a party to this agreement will provide the protection and coverage of the benefits under workmen's compensation and occupational disease laws,

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whether compulsory or elective, existing in the states in which the respective employees are employed. Refusal of any Employer to carry out this direction shall be deemed a violation of this agreement. Notice of compliance with this section shall be posted at the mine.

NOV 30 1972

SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT No. 4,
UNITED MINE WORKERS OF AMERICA; LOCAL No. 6330,
UNITED MINE WORKERS OF AMERICA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NA-
TIONAL ASSOCIATION OF MANUFACTURERS OF
THE UNITED STATES OF AMERICA, AS AMICUS
CURIAE, IN SUPPORT OF THE PETITION FOR WRIT
OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI

The National Association of Manufacturers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Petitioner, Gateway Coal Company, and of the Attorney for the Respondent, Local No. 6330, United Mine Workers of America, has been obtained.

The consent of the Attorney for the Respondents, United Mine Workers of America and District No. 4, United Mine Workers of America was requested but refused.

The National Association of Manufacturers (NAM) is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members have collective bargaining agreements with labor organizations and may, therefore, be directly affected by the decision in this case.

In the day-to-day labor-management relations of industrial concerns, grievances often arise which involve some issue of safety. This case is of particular interest to the members of the NAM because a fundamental, far reaching issue is presented involving the authority of a court to order arbitration and enjoin a strike when there is a labor dispute over a matter related to safety. It is, therefore, of vital importance to have Section 502 of the National Labor Relations Act interpreted so that both employers and employees will understand their rights and obligations in such circumstances.

By this motion the NAM seeks leave to show that: (1) the decision of the Third Circuit conflicts with decisions of the Supreme Court and is repugnant to national labor policy favoring arbitration; (2) there is a conflict among circuits regarding the interpretation of Section 502 of the National Labor Relations Act; (3) the practical effect of the decision will ad-

versely affect the stability of labor-management relations.

The NAM, therefore, urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

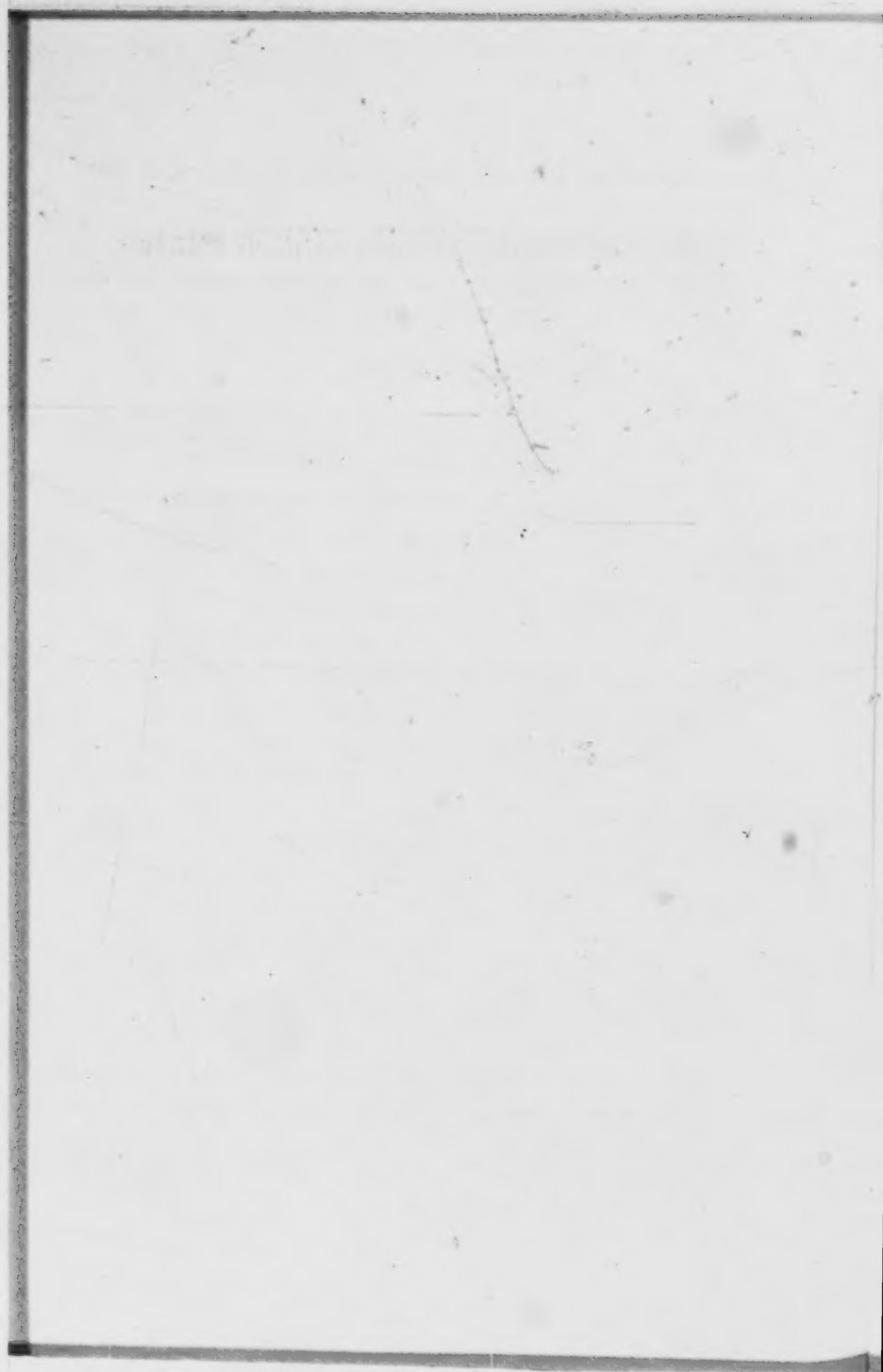
Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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BRIEF OF THE NATIONAL ASSOCIATION OF MANU-
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THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the National Association of Manu-
facturers (NAM), in this case is set forth in the fore-
going Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

The crux of the decision of the Court of Appeals for
the Third Circuit is that if employees believe in good
faith that "abnormally dangerous" working condi-
tions exist, they may strike during the term of their
collective bargaining agreement regardless of the con-

tractual provisions or whether objective evidence shows that the conditions are in fact unsafe. It is submitted that the decision of the lower court is contrary to national labor policy favoring arbitration and it misconstrues the applicable decisions of this Court. The collective bargaining contract between Gateway Coal Co. and the United Mine Workers does not contain an express no strike clause. However, where a grievance is subject to final and binding arbitration this Court has held that a no strike agreement is to be implied. As the Court reasoned in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flower Company* 369 U.S. 95, 105 (1962): "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." Therefore, in the present case it is necessary first to consider whether the arbitration provisions of the contract cover the dispute so an agreement not to strike can be inferred.

In *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 582-83 and 584-85 (1960) this Court said:

"An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

* * *

"In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the excusion

clause is vague and the arbitration clause quite broad."

The contract involved in the present case provides for arbitration of "all disputes and claims" except for disputes which are "national in character", which the agreement specifically states are to be resolved by "free collective bargaining as heretofore practiced in the industry" (Petitioner's App. 207). There is no claim that the present dispute is covered by that exception.

The Third Circuit concluded that a dispute involving a matter of safety is not subject to arbitration because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." (Opinion p. 5) That statement assumes that a matter is not arbitrable unless it is specifically stated in the contract which is contrary to the pronouncement of this Court in *Warrior & Gulf*, *supra*. Furthermore, the fact that the parties have been able to resolve past safety disputes without recourse to arbitration or strikes does not warrant the conclusion that the arbitration provisions of the contract are not applicable.

The lower court realized that its decision was grafting an exception onto the established rule and, after paying lip service to "a strong federal policy in favor of arbitration" stated: "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. . . . If employees believe the correctable circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate

their judgment to that of an arbitrator, however impartial he may be." (Opinion p. 5) The lower court supports its creation of an exception to the established rule by citing Section 502 of the National Labor Relations Act, which provides, "... nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." The Court held that employees may cease work because of a good faith apprehension of physical danger regardless of the objective evidence. That is the first time, so far as we have been able to ascertain, that the application of Section 502 has been held to turn solely on the good faith belief of employees when there was a lack of objective evidence to support the claim of the employees. The National Labor Relations Board and two Courts of Appeals have interpreted Section 502 differently.

The first clear statement by the NLRB on the meaning of Section 502 was made in *Redwing Carriers, Inc.*, 130 NLRB 1208 (1961) when it said:

"It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"

The Board has consistently used that test in subsequent cases where Section 502 has been raised to justify violation of a no strike clause. Two Courts of

Appeals have agreed with the NLRB and held that competent objective evidence was necessary to apply Section 502. *N.L.R.B. v. Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964); *N.L.R.B. v. Knight Morely Corp.*, 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958), reh. denied 358 U.S. 858 (1958).

With the new construction of Section 502 by the Court below, requiring only a good faith belief by the employees involved that an "abnormally dangerous" condition exists, that Section becomes of major significance in all labor relations. It can be used to undermine a no strike clause and defeat the grievance/arbitration procedures established by the contract. The decision of the lower court is not merely an erroneous interpretation of some little used section of the Act. Rather, the decision introduces a new factor into labor-management relations. As pointed out by Circuit Judge Rosemn in his dissenting opinion:

"... This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wild-catters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." (Opinion, pp. 9-10).

The practical effect of the decision is to encourage employees who want to strike during the term of a contract, but are bound by a no strike clause, to discover some safety grievance to use as a pretext for a strike. The present case presents just such an example: There was substantially more fresh air entering the mine, even with the obstruction, than was required by either state or federal laws. (Petitioner's App. 15) After the normal flow of air was restored, there was clearly no physical danger to miners, but they refused to work claiming that as long as the two negligent supervisors were responsible for safety procedures the miners' lives were jeopardized. The naked assertion was accepted by the lower court to justify the application of Section 502 and the refusal to enjoin the strike. The Court did not require any objective evidence to support the miners' contention that the premises were unsafe. This reasoning creates a loophole by which unions can escape the arbitration provisions of their contract and engage in a strike. Since some safety aspect can be easily injected into many grievances arising in the industrial community, the decision will have an unstabilizing effect on labor-management relations.

That strikes during the term of collective bargaining agreements are a national problem is shown by the remarks of Assistant Labor Secretary W. J. Usery, Jr., before the Annual Institute of Labor Law of the Southwestern Legal Foundation on October 27, 1972. He pointed out that approximately one-third of all strikes occur during the term of collective bargaining agreements. In order to cope with that problem he announced:

"The Labor-Management Services Administration is currently funding a study by the Bureau of Labor Statistics which we hope will furnish

further insights into this problem. The study should reveal the issues which precipitate such strikes, whether these issues were major subjects of prior negotiations, whether the grievance procedures were followed, and whether the disputed issues were subject to binding arbitration." (81 LRR 227).

The decision of the lower court could aggravate this already serious problem of strikes during the contract term by permitting strikes on the bare assertion that the premises were unsafe, regardless of the contractual provisions or objective evidence relating to the alleged unsafe condition.

CONCLUSION

It is submitted that this court should grant the Petition for a Writ of Certiorari because the decision is contrary to national labor policy favoring arbitration; because the decision on the applicability of Section 502 is in conflict with the interpretation of other circuits and of the National Labor Relations Board; and because the proper application of that section is important in preventing strikes during the term of collective bargaining agreements and in the conduct of labor-management relations throughout the country.

Respectfully submitted,

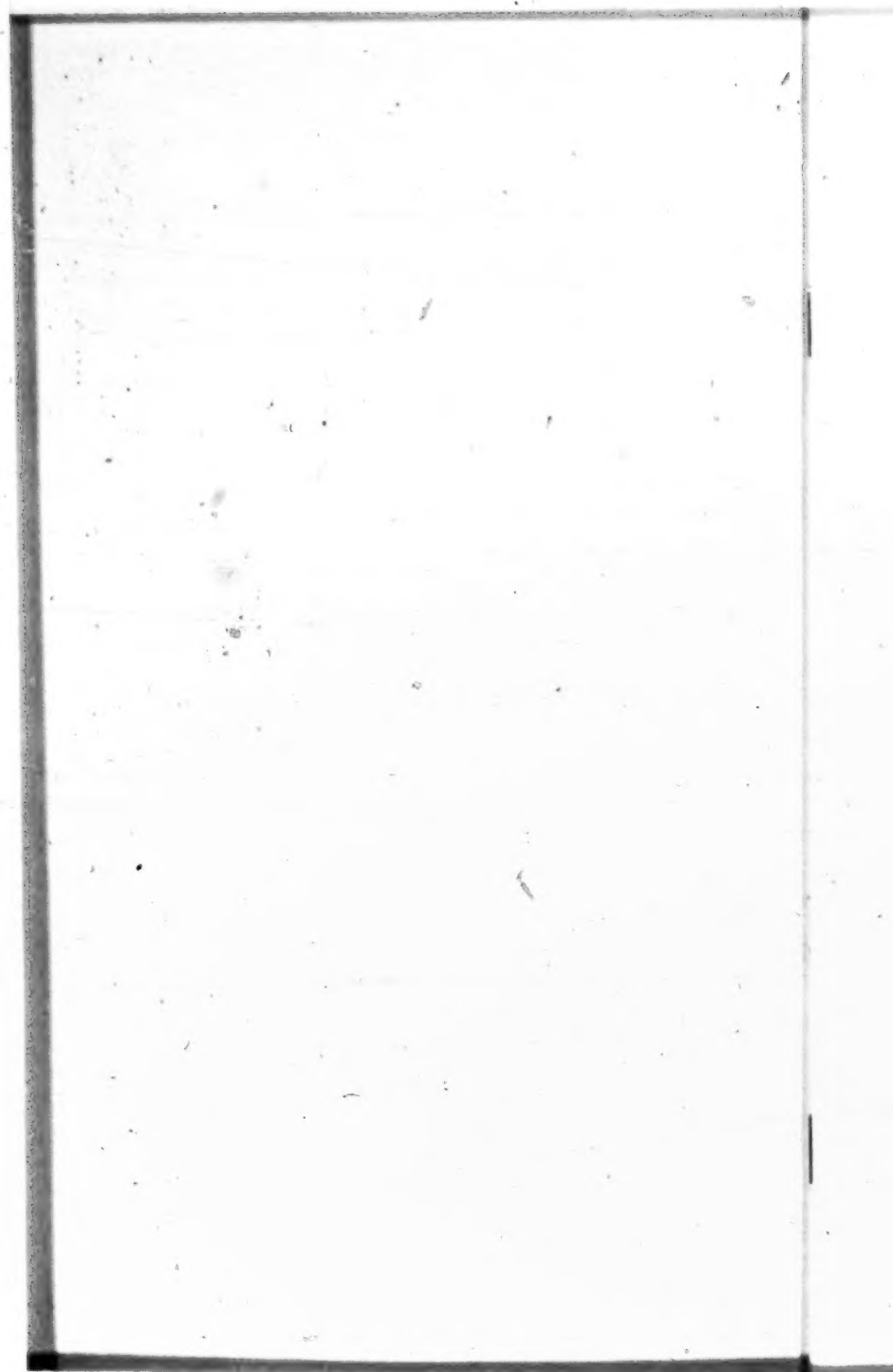
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November, 1972



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-782

GATEWAY COAL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE ON BEHALF OF THE CHAMBER OF COM-
MERCE OF THE UNITED STATES OF AMERICA AND
BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES OF
AMERICA IN SUPPORT OF THE PETITION FOR A
WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-782.

GATEWAY COAL COMPANY,
Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE ON BEHALF OF THE CHAMBER OF
COMMERCE OF THE UNITED STATES
OF AMERICA**

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae* in support of the petition for certiorari filed by Gateway Coal Company.¹ In support of this motion, the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States.

1. Pursuant to Rule 42 of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner gave such consent, but counsel for the United Mine Workers of America declined to do so. Counsel for the other respondents has not responded to the Chamber's request.

2. The first question raised in this case—whether a grievance not specifically excluded by the parties from arbitration may nevertheless be found non-arbitrable and thereby preclude enjoining a strike in violation of a contractual no-strike agreement—is a matter of substantial concern to the Chamber. This Court has held that, “apart from matters that the parties specifically exclude[d], all of the questions on which of the parties disagree[d] . . . [came] within the scope of grievance and arbitration provisions of the collective agreement.” *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960) (emphasis added). Moreover, a strike “over a grievance which both parties are contractually bound to arbitrate” is enjoinable in federal court. *Boys Markets v. Retail Clerks Union*, 398 U. S. 235, 254 (1970). Recent cases, however, have unsettled this law and threatened to erode these principles.² The instant case is an appropriate vehicle, therefore, for this Court to examine the continuing validity of its Trilogy decisions³ and determine whether, contrary to those decisions, arbitration should be replaced by economic warfare as the desired method of settling industrial disputes.

2. See, e.g., in addition to the instant case, *Amstar Corporation v. Amalgamated Meat Cutters*, F. 2d 81 LRRM 2644, 2645 (5th Cir. Nov. 6, 1972), where the court held that, since “[t]he *Boys Markets* holding was a ‘narrow one,’” a district court had no power to enjoin a strike and compel arbitration “when the legality of the strike sought to be enjoined is the alleged arbitrable dispute.” Cf., however, *International Union of Operating Engineers Local 150 v. Flair Builders, Inc.*, U. S. 32 L. Ed. 2d 248, 252 (1972), holding that where “the parties are subject to an agreement to arbitrate, and that agreement extends to ‘any difference’ between them, then a claim that particular grievances are barred by laches is an *arbitrable question* under the agreement.” (emphasis added).

3. *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*; *United Steelworkers of America v. Enterprise Corp.*, 363 U. S. 593 (1960). These decisions are commonly referred to as the Trilogy.

3. The other issue presented—whether a concerted refusal to work because of a subjective apprehension of danger is protected under Section 502 of the National Labor Relations Act (29 U. S. C. § 143)—is also a matter of far-reaching importance. Prior to the decision below, the “controlling factor” in determining the applicability of Section 502 to work stoppages was “not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered abnormally dangerous.” *Redwing Carriers*, 130 NLRB 1208, 1209 (1961). The court below, however, would establish, as Judge Rosenn noted in his dissent (App. C, p. 22a), a “new test . . . that ‘[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .,’ they need not arbitrate.” This novel approach, occurring in an area of numerous disputes,⁴ fails to harmonize the Act with other federal and state legislation specifically designed to deal with occupational health and safety.⁵ It raises an issue of major and recurring significance which warrants review by this Court.

4. See, e.g., *American Oil Company*, 51 LA 484 (1968); *United States Steel Corporation*, 51 LA 571 (1968); *A. G. Suitor Construction Co.*, 52 LA 599 (1969); *Carmet Co.*, 52 LA 790 (1969); *Phillips Pipe Line Co.*, 54 LA 1019 (1970); *United States Steel Corp.*, 55 LA 61 (1970); *Alaska Lumber & Pulp Company, Incorporated*, 70-2 ARB ¶ 8707 (1969); *Hill Acme Company*, 70-2 ARB ¶ 8774 (1970); *International Salt Company*, 63-2 ARB ¶ 8680 (1963); *H. O. Confield of Virginia, Inc.*, 63-2 ARB ¶ 8714 (1963); *Joseph T. Ryerson and Son, Inc.*, 63-2 ARB ¶ 8815 (1963); *The Cleveland Newspaper Publishers Association*, 64-3 ARB ¶ 9122 (1963); *American Saint Gobain Corporation*, 66-2 ARB ¶ 8606 (1966).

5. See, e.g., the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.*; the Coal Mine Health & Safety Act, 30 U. S. C. § 801 *et seq.*; and, with respect to this case, Pa. Stat. Ann., Tit. 52, § 70-101 *et seq.*

For the foregoing reasons, the Chamber respectfully requests leave to present its views.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972.

No. 72-782.

GATEWAY COAL COMPANY,
Petitioner,
vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

**BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF THE PETI-
TION FOR A WRIT OF CERTIORARI**

This brief *amicus curiae* is filed on behalf of The Chamber of Commerce of the United States of America contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts with the Principle Established by This Court That All Grievances Arising Under a Labor Agreement Are Arbitrable Thereunder Unless Specifically Excluded.

1. This Court has repeatedly "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and [has] cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union*, 398 U. S. 235, 243 (1970). Accordingly, "an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and that "only the most *forceful evidence* of a purpose to exclude the claim should prevail." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583, 584 (1960) (emphasis added). See also *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95 (1962), where, even in the absence of an explicit contractual provision, this Court implied an agreement not to strike; and the other similar decisions noted in the petition (p. 16, n. 5). The controlling principle, in short, has been that unless arbitration of a grievance is specifically *excluded* by the parties, the dispute is arbitrable.

The court below disregarded these precepts. Notwithstanding the absence of an express exclusion, the decision below created its own exception to the parties' broad

arbitration agreement.¹ The court thus took a diametrically opposite view to the Trilogy and other decisions noted above. It placed the burden on the party seeking arbitration to show that a dispute was specifically *included*, that the parties either "particularly stated [or] unambiguously agreed" (App. C, p. 16a) that the dispute would be arbitrable. This decision, particularly when coupled with a recent similar view taken by the Fifth Circuit,² creates a sharp dislocation in industrial relations. Judges and arbitrators alike have been left with conflicting interpretations about their responsibilities with respect to contractual arbitration and no-strike provisions. The result, with its encouragement of "strikes, lockouts and similar devices" (*Boys Markets*, 398 U. S. at 252) as a "fang and claw"³ alternative to arbitration, is surely inconsistent with the Act's purpose of promoting "industrial peace and stability" rather than "industrial strife." *Carey v. West-*

1. The contract in this case contains an arbitration provision providing that "all disputes and claims which are not settled by agreement shall be settled by arbitration" (App. C, p. 6a), a clause virtually identical to that involved in *Boys Markets*. See 398 U. S. at 237, n. 1.

2. See *Amstar Corporation v. Amalgamated Meat Cutters*, F. 2d 81 LRRM 2644, 2645 (5th Cir. Nov. 6, 1972), where the court held that, since "[t]he *Boys Markets* holding was a 'narrow one,'" a district court had no power to enjoin a strike and compel arbitration "when the legality of the strike sought to be enjoined is the alleged arbitrable dispute." Cf., however, *International Union of Operating Engineers Local 150 v. Flair Builders, Inc.*, U. S., 32 L. Ed. 2d 248, 252 (1972), holding that where "the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an *arbitrable question* under the agreement." (emphasis added).

3. As an early commentator noted, "Industrial peace is not a God-given product. It must be cultivated and worked for constantly. . . . Conciliation, mediation and voluntary arbitration are the marks of civilization. They are the enemies of distrust and force. They do away with the fang and claw." McGrady, *Industrial Peace: A Joint Enterprise*, 2 Arb. Journal 339, 343 (1938).

inghouse Electric Corporation, 375 U. S. 261, 274 (1964). This Court, it is submitted, should utilize the present case as an appropriate vehicle to clarify this important area of the law.

2. The decision below further erodes the Trilogy by disregarding the admonition that here, as in every arbitration situation, "it is the arbitrator's construction which was bargained for; . . . and the courts have no business overruling him because their interpretation of a contract is different from his." *Enterprise Corp.*, 363 U. S. at 599.⁴ The court of appeals, however, overturned the arbitrator's decision in this case as well as the determination of the Pennsylvania Department of Environmental Resources and substituted, in lieu of these informed opinions, its own view as to the resolution of the parties' dispute—a determination which, as Judge Rosen observed, "solves nothing" (App. C, p. 24a). The denigration of the arbitration process thus occasioned is significant. The arbitration clause in the present case is representative of the provisions usually found in collective bargaining agreements. Few such contracts either restrict arbitration or expressly provide for the arbitration of particular grievances.⁵ Clearly, therefore, regardless of the post-litigation alteration of

4. In *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1933, 1934 (1971), the National Labor Relations Board recently recognized that disputes arising under a labor agreement "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." Accordingly, the Board held that it will defer, in certain circumstances, "to the arbitration clause conceived by the parties." 77 LRRM at 1936. See also *Ries v. Reynolds Metal Co.*, _____ F. 2d _____, 5 FEP Cases 1 (5th Cir. Sept. 20, 1972), which enunciated a similar policy of deferral under Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000-e, et seq.).

5. "About 94% of contracts provide for arbitration of grievances not settled by the parties themselves." 51 *Collective Bargaining—Negotiations and Contracts*, p. 6 (Washington, D. C.: BNA, Inc. 1970). Of these contracts, only 38% contain any limitation upon the scope of arbitration. Restriction of safety dispute arbitra-

the parties' bituminous coal agreement (see pet., n. 6), this case raises a significant issue.

3. In *Boys Markets*, this Court made no distinction, as does the court below (App. C, p. 18a, n. 1), between the arbitration of economic and safety disputes; or differentiated between the case *sub judice* and other controversies as in *Amstar*. "Having agreed to the broad [arbitration] clause, [the parties] are obligated to submit," as this Court indicated just this year in *Flair Builders*, all of their claims and defenses to "the arbitral process." 32 L. Ed. 2d at 252. This rule is consistent with settled industrial practice. Grievances involving disputes arising out of alleged dangerous working conditions, for example, are grist for the arbitrator's mill.⁶ The decision below thus undermines sound industrial relations practice as established over a period of many years by union and employer representatives actively involved in day-to-day labor relations. It raises an issue, therefore, which is worthy of this Court's attention.

tion, the issue involved in this case, is so minimal that the Bureau of National Affairs in the above study did not even list safety disputes as one of the "prevalent exclusions" from arbitration. Further, in the most recent study prepared for the Bureau of Labor Statistics of the Department of Labor, only "about 5% of the grievance provisions, covering 9% of the workers, . . . listed one or more specific issues that were excluded from the grievance process." None of these issues related to safety disputes. See Solby & Cunningham, *Grievance Procedures in Major Contracts*, BLS Bulletin 1425-1 (Department of Labor, Bureau of Labor Statistics, 1965).

6. The Commerce Clearing House, Labor Arbitration Awards Series, has published, since 1961, more than 100 awards dealing with safety disputes. The Bureau of National Affairs, Labor Arbitration Series, has published more than 50 awards since 1963 on the same subject. Many, if not the majority, of these awards concern the issue of whether, under a particular contract, employees may engage in a work stoppage when exposed to alleged dangerous working conditions, the very issue in this case. See Labor Arbitration, Cumulative Index and Digest, BNA Nos. 118.658 and 124.70; Labor Arbitration Awards, Commerce Clearing House, Topical Index Digest, Topic: Safety; and the cases noted in the annexed motion at n. 2.

4. The decision below is also in conflict with the decision of the Eighth Circuit in *Hanna Mining Co. v. Steelworkers*, F. 2d, 80 LRRM 3268 (July 21, 1972). In *Hanna*, the court found that a safety dispute was arbitrable and enjoined a walkout. The Eighth Circuit attempted to distinguish the decision below on the ground that the *Hanna* agreement, in contrast to the agreement involved here, specifically required that safety disputes be submitted to arbitration. This, the Chamber submits, is a tenuous distinction.⁷ The *Hanna* decision is consistent with the requirement of the Trilogy decisions, as well as with *Flair Builders* and the other cases noted above, that a grievance must be arbitrated absent "forceful evidence" of an intent to exclude such a controversy. The instant decision, however, is wholly at odds with that requirement. There is, therefore, a clear conflict between the circuits which should now be resolved.

II.

The Interpretation of Section 502 of the Act by the Court Below Conflicts with Prior Interpretations and Raises a Matter of Significant First Impression Before This Court.

Wholly apart from the foregoing issues, the instant decision raises a question of first impression in the important area of occupational health and safety. Indeed, review of this case would clarify the appropriate balance between the rights and duties of employees and employers under the National Labor Relations Act with their rights and duties under the Occupational Safety and Health Act and other similar federal and state legislation.

1. The National Labor Relations Board and every court

7. The court below held that "a dispute concerning the safety of the place and circumstances in which employees are required to work is *sui generis*. The present case exemplifies the special and distinguishing character of the safety disputes." App. C, p. 16a. The court below would thus have reached the same result *even if* the instant contract had expressly required the arbitration of safety disputes.

which heretofore considered the application of Section 502 to a work stoppage over alleged "abnormally dangerous working conditions" interpreted that "term [to] contemplate . . . an objective as opposed to a subjective test." *Redwing Carriers*, 130 NLRB 1208, 1209 (1961). The controlling factor was "not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Stop & Shop Inc.*, 161 NLRB 75, 76, n. 3 (1966).⁸ The court below, however, would allow the employees themselves to determine whether a safety hazard exists. See *United States Steel Corp. v. United Mine Workers*, _____ F. 2d _____, 69 LC ¶ 13,132 (3d Cir. Nov. 6, 1972). In its view, a "refusal to work because of a *good faith apprehension* of physical danger is protected activity and not enjoinable, even where the parties have subscribed to a comprehensive no-strike clause in their labor contract." App. C, p. 17a (emphasis added). This subjective approach, as both the petition (p. 16) and the dissent below (App. C, p. 22a) note, will have a dangerous impact upon the stability of labor relations. As the instant case illustrates, this rule will permit employees to subvert any no-strike agreement merely by their "naked assertion" that a work stoppage was caused by an "apprehension of danger."

2. The approach of the court below is particularly anachronistic in light of the substantial state and federal legislation governing industrial safety. There is now a comprehensive statute, the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.*, which regulates safety in all enterprises employing at least 25 persons, as well

8. See also *Curtis Mathes Manufacturing Company*, 145 NLRB 473 (1963); *Fruin-Colnon Company*, 135 NLRB 737 (1962), *enf'd.* 303, F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964); *N. L. R. B. v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. den.* 357 U. S. 927 (1958); *Philadelphia Marine Trade Association*, 138 NLRB 737, *enf'd.* 330 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964).

as extensive coal mine health and safety legislation.⁹ These laws were carefully designed so as not to interfere with collective bargaining and the delicate relationship of parties to a labor agreement. The decision below, in failing to give any credence to the determinations of both federal and state mine inspectors, disrupts this desired harmony. It has raised, therefore, an important question of statutory accomodation in an emerging area of national labor policy.

CONCLUSION.

For all the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the Chamber respectfully urges this Court to grant certiorari.

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9. Both the federal Coal Mine Health and Safety Act (30 U. S. C. § 801, *et seq.*) and the Pennsylvania Statutes (Pa. Stat. Ann., Tit. 52, § 70-101 *et seq.*) provide remedies for the correction of the alleged safety problems involved in this case. The former Act is a "very technical and scientific piece of draftsmanship," a "truly comprehensive piece of legislation." Furthermore, "Pennsylvania has provided the best overall standards for mine safety in the nation" and has "the lowest injury rate in both fatal and non-fatal accident categories" of any of the four leading coal-producing states. See Comment, *The 1969 Coal Mine Health and Safety Act: A Survey of Mine Safety Legislation in Pennsylvania*, 31 U. Pitt. L. Rev. 665, 669, 673 (1970).

SUPREME COURT, U. S.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1972

No. 72-782

GATEWAY COAL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, et al.,

Respondents.

**OPPOSITION TO MOTION
TO FILE BRIEFS
AMICUS CARIAE**

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**IN THE
SUPREME COURT OF THE UNITED STATES**

**October Term, 1972
No. 72-782**

**GATEWAY COAL COMPANY,
Petitioner,**

vs.

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Respondents.**

**OPPOSITION TO MOTIONS TO
FILE BRIEFS AMICUS CURIAE**

Respondents, UNITED MINE WORKERS OF AMERICA and DISTRICT 4, UNITED MINE WORKERS OF AMERICA, oppose the various Motions filed for leave to file Briefs Amicus Curiae in support of the Petition for Writ of Certiorari for the following reasons:

1. Motions for Leave to File Briefs Amicus Curiae have been filed on behalf of National Association of Manufacturers of the United States of America, The Chamber of Commerce of the United States of America, and the Bituminous Coal Operators Association, Inc.

2. The Motions in question do not state any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties.

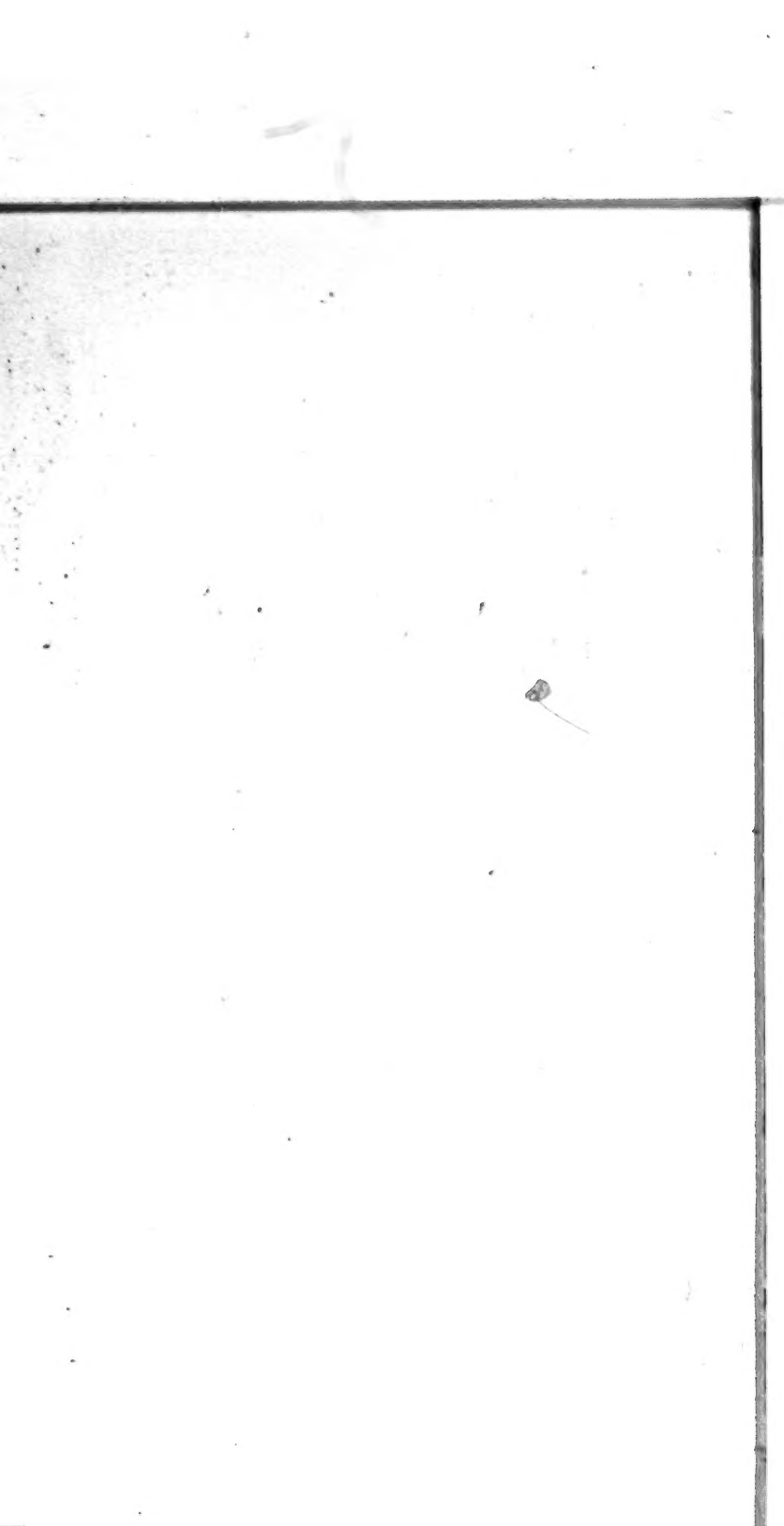
3. U.S. Supreme Court Rule 42(1) provides that such Motions are not favored.

4. Petitioner is represented by the law firm of Reed, Smith, Shaw & McClay, which is a large, experienced and well respected firm which represents numerous coal companies and will adequately represent the interests of those parties seeking leave to file Briefs Amicus Curiae. In fact, Petitioner is a member of the Bituminous Coal Operators Association, Inc., one of the movants.

WHEREFORE, it is respectfully requested that the Motions of National Association of Manufacturers of the United States of America, The Chamber of Commerce of the United States of America, and the Bituminous Coal Operators Association, Inc., to file Briefs Amicus Curiae be denied.

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of America



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-782

GATEWAY COAL COMPANY,

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vs.

UNITED MINE WORKERS OF AMERICA, et al.,

Respondents.

BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1972
No. 72-782

**GATEWAY COAL COMPANY,
Petitioner,**

vs.

**UNITED MINE WORKERS OF AMERICA, et al.,
Respondents.**

**BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Respondents, UNITED MINE WORKERS OF AMERICA and DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA, oppose the Petition for Writ of Certiorari and herein present arguments in opposition.

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

In an action wherein employees quit their labor in good faith because of abnormally dangerous conditions for work at the place of employment of such employees, and the Court finds objective evidence of such dangerous conditions and that there is no basis in the record for a finding that the employees did not honestly believe that their lives were unduly endangered, and the Court further finds that the contract involved does not require the arbitration of safety disputes, is not the Court of Appeals correct in reversing the District Court and remanding the case with directions that the preliminary injunction issued be dissolved?

COUNTER STATEMENT OF THE CASE

On June 28, 1971, the United States District Court for the Western District of Pennsylvania issued a preliminary injunction enjoining Respondents from engaging in any work stoppage at Petitioner's Gateway Mine. The injunction further required Respondents to arbitrate the issue of whether two assistant mine foremen, previously suspended by the Company, could be returned to work prior to the adjudication of criminal charges preferred by a state mine inspector for making false entries in mine ventilation records. (R. pp. 221-225).¹ For reasons explained below, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court and ordered the case remanded for a vacating of the preliminary injunction. A Petition for Rehearing was denied. The petition followed.

The Gateway mine is a very large mine located in Greene County, Pennsylvania, and employs approximately 550 miners. (R. pp. 10-11). The Gateway mine liberates approximately 4 million cubic feet of methane gas every twenty-four hours (R. p. 16) as a result of which it is classified as "especially hazardous" by the United States Department of Interior, Bureau of Mines. (R. p. 80).

As an "especially hazardous" mine, the Gateway mine is subject to unannounced spot inspections by Federal mine in-

1. For the convenience of the Court, all page references to the record in this Brief will be to the Appendix filed by Local 6330 in the United States Court of Appeals for the Third Circuit and will be designated as "R. p. ____".

spectors no less often than once every five days under the Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C.A. § 813(i).

On the morning of April 15, 1970, the men working in the area of the mine designated "three butt", located approximately two thousand feet from the surface, noticed that the quality of air in their area was impaired. An air reading taken by the foreman in charge revealed that the air flow had dropped to less than 40% of the level established by the Gateway safety engineer. (R. pp. 15, 65-66).

The maintenance of proper ventilation is of critical importance to the underground coal miner to safeguard against the danger of gas and dust explosions. (R. pp. 64-65). The radical reduction in air flow was therefore an extremely serious problem. Electrical power in the area was shut off and men were dispatched from the surface to locate the problem. (R. pp. 18 & 74).

Approximately one hour following the discovery of the air problem in the "three butt" area, the fan attendant in the course of his regular inspection of fan instruments discovered that air pressure at one of the mine's four fans had dropped twenty-five per cent. Alerted by this discovery that the ventilation problem affected the entire mine, the Company ordered all power disconnected and all men withdrawn from the mine. (R. pp. 18-19).

Further investigation revealed that the ventilation failure resulted from a short circuit in the system caused by a fallen overcast which had fallen at approximately 4:00 o'clock a.m. on April 15. (R. p. 14). The investigation also revealed that the three foremen who, pursuant to the specific mandates of Federal and state law, conducted the pre-shift inspection of the mine to check for proper ventilation and accumulations of methane gas had recorded normal air readings in the mine record book well after the time the overcast fell. (R. pp. 22, 54-55, 152-53, 155). As a result of this discovery of an obvious falsification of mine records, the state mine inspector seized the mine records in question and subsequently filed criminal charges against the three foremen in question for falsifying mine records. (R. p. 98).

A special meeting of Local 6330 was held on Sunday, April 18, 1971. The local union's mine safety committee, which had requested the prior day's special inspection by Federal and State inspectors, reported the results of that inspection to the membership. The membership knew that normal mining operations continued in the mine for a period of three and one-half hours after ventilation had been impaired by the fallen overcast. During this period of time when reduced ventilation allowed increased accumulations of dust and methane gas, a cutting torch had been in use in one of the sections of the mine. (R. pp. 152-53). The membership was also aware of the fact that each of the three foremen involved had previously been brought to the attention of the Local Union as unfit to carry out supervisory duties (R. p. 137) and had been censured by the Local Union or the Company for unsafe practices. (R. pp. 142, 154, 160-161).

As a result of the report of the safety committee concerning the falsification of mine records and the prior history of the foremen in question, a motion was made not to return to work with these foremen for the reason that to do so would jeopardize the safety of the men. (R. pp. 133-34, 157). Approximately 200 to 225 members of Local 6330 were in attendance at the special meeting. (R. pp. 136, 154). The motion was adopted unanimously. (R. p. 137). Four members of Local 6330 who attended the special meeting testified before the District Court. Each member who testified explained that he voted for the motion because he considered the mine unsafe with the foremen in question again in positions where their conduct could jeopardize the safety of the men in the mine. (R. pp. 133-34, 142, 152-55, 162). All three Local Union members who were asked, further testified that they had consistently refused to work with these foremen since first learning of the falsified records at the special meeting. (R. pp. 148, 157, 165).

The members of Local 6330 returned to work on April 19, 1971, when the Company agreed to suspend the foremen involved until such time as legal proceedings involving the foremen were concluded. On May 29, 1971, the Company received a copy of a letter directed to Local Union 6330. In that letter the Pennsylvania Department of Environmental Resources noted that criminal charges had been filed against the foremen in question and concurred in that action. In light of that pending criminal action and the department's view that the purpose of the penalty section of the State mining law was

to punish violators of the law to the extent deemed appropriate by the judiciary, the Department stated that it would not seek to decertify the foremen in question. (R. p. 212). Two days after receiving the letter and on the eve of resumption of mining operations following the Memorial Day holiday, the Company reinstated the foremen. The men refused to enter the mine knowing that they thereby disqualified themselves for holiday pay. (Ap. p. 97).

Following this cessation of operations, the Company sought and obtained a preliminary injunction requiring the members of Local 6330 to return to work and requiring Respondents to arbitrate the safety dispute which gave rise to the work stoppage. However, the Court conditioned the injunction on the continued suspension of the foremen pending arbitration.

The Court of Appeals reversed and remanded the case for vacating of the preliminary injunction. The Court of Appeals properly held that disputes involving safety of the place and circumstances in which employees are required to work are of a special and distinguishing character. It noted that an enlightened society should not require men to submit matters of life or death to arbitration under circumstances where the men and not the arbitrator must stake their lives on the arbitrator's decision.

In addition, the Court of Appeals after reviewing the contract and evidence, found that the contract did not provide for compulsory arbitration of safety disputes and that the foremen had been guilty of significant dereliction. The Court further found that the contract requires the Company to comply with the recommendations of the mine safety committee, that the union membership meeting, a body superior to that committee, had unanimously voted to stay out of the mine because of a particular hazard, and that there was no finding or basis for a finding in the record that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures.

The Petition for Writ of Certiorari followed.

ARGUMENTS AND REASONS WHY THE WRIT SHOULD BE REFUSED

1. The Company argues that the decision of the Court of Appeals conflicts with the Federal labor policy favoring arbitration of industrial disputes. The Company erroneously reads the Court's decision as stating that all safety disputes under all circumstances may not be arbitrated and then argues that such a holding conflicts with Section 203(d) of the Labor-Management Relations Act and the decisions of this Court in the Steelworkers trilogy.

In Steelworkers vs. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) this Court ruled that Federal courts should order specific performance of arbitration agreements even where the grievance involved the contracting out of work and the contract excluded from arbitration matters which were strictly a function of management. The Court announced a broad presumption in favor of arbitration.

In Steelworkers vs. American Mfg. Co., 363 U.S. 564 (1960), this Court ruled that when parties had agreed to submit all questions of contract interpretation to the arbitrator, the function of the court is limited to determining whether the claim on its face is governed by the contract. In such cases, the courts should not weigh the merits but refer even frivolous claims to arbitration.

In these two cases as in Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) this Court, in conformity with the statutory mandate, established arbitration as the key-stone of Federal labor policy. Yet in each case, this Court indicated that its decisions were based on the contractual consent of each of the parties to utilize arbitration to settle specific disputes. Arbitration cannot be imposed on parties who have not bargained for and accepted it. Thus, the rule enunciated in Steelworkers vs. American Mfg. Co., applies "when the parties have agreed to submit all questions of contract interpretation to the arbitrator." 363 U.S. at 567-68. It is not arbitration per se but "the means chosen by the parties for settlement of their differences under a collective bargaining agreement" (363 U.S. 564, 566) which must be given full pay. To be sure doubts are to be resolved in favor of coverage, but it is equally true that "arbitration is a matter of contract and a party cannot

be required to submit to arbitration any dispute which he has not agreed so to submit". Steelworkers vs. Warrior & Gulf Navig. Co., 363 U.S. at 582. Section 203(d) declares that public policy favors settlement of disputes "by method agreed upon by the Parties".

In the case at bar, the Court of Appeals found that safety disputes are not within the ambit of the arbitration provisions of the National Bituminous Coal Wage Agreement of 1968. The Court of Appeals noted that the collective bargaining agreement,

specifically provides that, regardless of the views or judgement of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous. And, in this case, a union membership meeting, the body superior of the mine safety committee, unanimously voted to stay out of the mine because of a particular hazard.

Petition, Appendix C, p. 15a.

Moreover, the prior practice of the parties, as testified to by both company and union witnesses, indicated that safety disputes were not arbitrable.

The Petitioner's argument that this decision prevents parties from arbitrating safety disputes arising under recent Federal industrial safety legislation is spurious. It completely disregards the Court of Appeals findings that the safety dispute in question is not arbitrable because of the terms of the 1968 Contract and the history of its implementation. Clearly, where parties agree to arbitrate safety, the Federal courts may enforce that agreement. The Court raises but does not decide the question of whether a work stoppage over such a dispute is enjoinable and, in so doing, implies that at the very least such a dispute would be arbitrable.

Rather than conflicting with Federal labor policy and the decisions of this Court, the decision of the Court of Appeals is in conformity with that authority. After reviewing the 1968 Contract, the Court ruled that safety disputes are not arbitrable under its now expired and superceded provisions. Both the contractual exclusion and the Court's review of the contract to determine arbitrability are in harmony with Federal labor law and the decisions of this Court.

2. Similarly, Petitioner's argument that the Court of Appeals' decision conflicts with the decision of this Court in Steelworkers vs. Enterprise Wheel & Car Corp., *supra*, is without foundation. The Court of Appeals did not decide the merits of the dispute and impose its judgment over that of the Umpire. On the contrary, the Court ruled that safety disputes were excepted from the arbitration clause of this contract and thus an arbitrator was without power or authority to decide the dispute. The Court's ruling did not concern itself with the merits of the dispute. It reversed a preliminary injunction ordering a dispute to arbitration on the grounds that the parties had not agreed to arbitration of the dispute involved.

3. Petitioner's third argument attempts to demonstrate a conflict between the decision of the Court of Appeals and the decision of this Court in Boys Markets, Inc. vs. Retail Clerks Union, 398 U.S. 235 (1970). Once again, however, Petitioner misstates the holding of the Court of Appeals. In at least two points in its Petition, the Petitioner argues that the Court of Appeals held that a strike over a safety dispute is not enjoined or, alternatively, that Boys Markets is limited in its application to an economic dispute not involving safety. (Petition, pp. 16 & 18, fn. 7).

The Company bases its assertions on footnote 1 to the Court's decision. (Petition, Appendix C p. 18a, fn. 1). That footnote and the text to which it is tied read as follows:

For these reasons the present contract should not be construed as providing for compulsory arbitration of safety disputes.¹

¹ This conclusion makes it unnecessary to discuss Boys Market, Inc. vs. Retail Clerk's Union, 1970, 398 U.S. 235, upon which appellee places great reliance. For that decision is grounded upon a finding that an economic dispute, not involving safety, was subject to compulsory arbitration under the employees' labor contract.

It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoined. (Petition, Appendix C, p. 18a).

This text and footnote make it clear that the Court does not hold that a strike over any safety dispute is not arbitrable or that Boys Markets is limited in its application to economic disputes. The holding is that under the present contract safety disputes are not arbitrable. Boys Markets is never reached because it is based on a strike over an arbitrable dispute. This decision does not decide the question of a safety strike in the context of a contract providing for the arbitration of such disputes. No conflict is present.

Nor, as Petitioner argues, will this decision have a devastating effect on the stability of labor relations. Employees have been guaranteed the right to cease working because of a good faith belief that working conditions are abnormally dangerous since 1947 with no such devastating effect. This codification of a natural right is further enforced by the Congressional finding that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource - the miner". Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C.A. § 801. The Court of Appeals has ruled that the 1968 contract did not provide for arbitration of safety disputes. It did not hold that safety disputes may not be arbitrated. This Court may at some appropriate time wish to review the interplay of Section 502 and its decision in Boys Markets. However, inasmuch as the case at bar involves a contract which does not make safety disputes subject to arbitration and, as such, is not within the ambit of this Court's consideration in Boys Markets, this is an inappropriate case for review of this subject.

4. Petitioner's final argument is that the decision raises a vital question concerning the interpretation of Section 502 of the Labor-Management Relations Act. In accordance with the dissent of Judge Rosenn, Petitioner argues that the majority has departed from prior interpretations of Section 502 which require ascertainable objective evidence of the abnormally dangerous conditions.

It is respectfully submitted that Judge Rosenn and Petitioner have misread the majority's opinion and have overlooked the findings on which it is based. Thus, it was undisputed that, at the time of the incident in question, the flow of air in the mine had dropped to less than forty per cent of the level established by the Company's safety engineers. It was undisputed that this

condition was caused by a partial blockage of an air intake and that the consequence of such a drop in ventilation was the potentially dangerous increased accumulations of dust and flammable gas with the consequent increased risk of explosion. It was also undisputed that the foremen in question, who had previously been the subject of Company or union reprimand for safety violations, had made false entries in the mine ventilation records. The Court found that these foremen had been guilty of significant dereliction. It noted that they had pleaded nolo contendere to the criminal charges filed against them.

Section 502 states:

... nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The plain meaning of this language is that an employee who in good faith ceases work because of abnormally dangerous conditions has not engaged in a strike. In determining whether a work stoppage is protected by Section 502, a court must determine that conditions at the place of employment are abnormally dangerous and that the employees stopped work in good faith over these conditions.

In the case at bar, the Court of Appeals made both findings. The Court stated:

any failure of responsible supervisors to perform their assigned duty to check air flow in a mine and to record and immediately report any significant diminution can cause the death of many men. In such circumstances, a single negligent failure to take a required safety precaution may reasonably be viewed as intolerable by those whose lives are at stake.

Petition, Appendix C. P. 16a.

This language makes it clear that the majority agreed that the presence in the mine of foremen, who had been criminally negligent in carrying out their obligations to safeguard the work force from potentially catastrophic explosions, rendered working conditions in the mine abnormally dangerous. The Court further stated:

there is no finding, indeed no basis for a finding in this record that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures.

Petition, Appendix C. p. 14a.

Thus the Court found that conditions in the mine were abnormally dangerous and that the employees had ceased work in good faith because of those conditions.

Similarly, in U.S. Steel Corp. vs. United Mine Workers, Nos. 71-1974/75 (3rd Cir., filed November 6, 1972), the Court of Appeals found that, in deciding to cease work because of abnormally dangerous conditions, "the miners reached a conclusion which the district court could not say was unjustified". The decision of the Court of Appeals in Gateway Coal Co. vs. United Mine Workers is in conformity with prior interpretation of Section 502.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

Respondent, Local Union 6330, United Mine Workers of America, opposes the petition for writ of certiorari for the reasons presented herein.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Was the Court of Appeals correct in deciding, as a matter of contract interpretation, that the collective bargaining agreement in the present case does not contain any obligation on the part of employees to submit safety disputes to compulsory arbitration?

STATEMENT OF THE CASE

Respondent Local Union 6330 relies on the statement of facts contained in Judge Hastie's opinion for the Court of Appeals. Pet. App. C. That statement

makes clear what the petitioner's bland account does not: that the work stoppage in the present case arose because of the gravest sort of dereliction of duty by supervisory personnel at the Gateway Mine; that the dereliction involved willful, indeed criminal, failure to carry out mine safety procedures required by law; that as a result, the lives of coal miners working underground at Gateway were put in jeopardy; that the walkout was undertaken as a specific protest against unsafe working conditions which were left uncorrected by petitioner and were honestly and reasonably regarded as intolerable by the men whose lives were at stake.

REASONS FOR DENYING THE WRIT

This Court's decision in *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970), holds that when a work stoppage violates the employees' contractual duty to arbitrate—but not otherwise—an injunction may issue restraining the walkout. In each case in which an employer invokes *Boys Markets* and prays for issuance of a labor injunction, the court must decide in the first instance whether the particular walkout does in fact amount to a violation of the labor agreement in question. More specifically, it must decide whether the stoppage concerns an underlying dispute or grievance that the bargaining parties have obligated themselves to settle, not by self-help, but by compulsory arbitration. In the present case this threshold issue was decided adversely to petitioner. The decision below involves the application of well-established principles to particular facts, and gives rise to no important question of federal law appropriate for resolution by this Court.

1. This case turns on a narrow question of contract interpretation: whether the 1968 Bituminous Coal Wage Agreement requires safety disputes to be submitted to compulsory arbitration. The text and background of that particular private agreement determine the issue, and thus the practical significance of the decision below at most extends to the parties to the bargaining contract in question. Moreover, the relevant contractual provisions have since been changed—the 1971 agreement by specific terms makes safety issues subject to arbitration. See Pet. at p. 17, n. 6. It follows that the ruling below no longer controls even the relations of the bargaining parties herein. The case, in short, by no stretch presents “an important question of federal law” calling for review by this Court. Sup. Ct. Rule 19(b).

All that is needed to decide the case is the ruling below that the 1968 agreement cannot be read to require arbitration of safety disputes. It follows that a safety walkout cannot be enjoined, for absent a contractual duty to arbitrate, employee self-help in a safety dispute is entirely permissible and, as the court held, “[t]here was no wrong to enjoin.” Pet. App. C, at p. 18a. The 1968 agreement contained (1) a broad and vaguely worded arbitration clause, with no mention of specific types of disputes; and (2) a specific provision pertaining directly to the unique problem of safety disputes, which by express terms gives a local union the right to stop work in protest against unsafe conditions that have gone uncorrected by mine management. The court quite sensibly decided that the specific self-help provision must be read to govern the general arbitration provision. In this way the contract as a whole is read harmoniously,

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), and the quite evident intent of the bargaining parties—to provide a self-help exception in disputes involving mine safety, the matter of greatest concern to every coal miner—is honored. This interpretation is buttressed by the undisputed finding that no safety dispute at the Gateway mine had ever before been submitted to compulsory arbitration.

In resolving the narrow and dispositive question of contract interpretation, the court below touched upon broader themes concerning federal statutory policy in the areas of labor arbitration, labor injunctions, and protection of safety walkouts. As is indicated *infra*, the Court of Appeals' discussion under these headings in no way clashes with decisions and declarations of this Court. But it remains that all that is necessary to the decision below is a purposive construction of various relevant provisions of the 1968 agreement. In particular, the court below expressly reserved judgment on the question whether any provision of federal law amounts to an independent, noncontractual basis for shielding safety walkouts from injunctions. See Pet. App. C, at p. 18a, n. 1. That question need not arise in a case where the bargaining agreement would not itself support injunctive intervention. Indeed, that question may come to be litigated now that the provisions of the 1968 agreement concerning safety disputes have been rewritten and superceded by the 1971 agreement, which for the first time includes a provision for arbitration of safety disputes. But it would be most inappropriate to use the present case as a vehicle for addressing any of the broader questions that come to mind, since the court below had no occasion to do so, much less to consider the terms of the 1971 agreement and their impact on the situation at hand.

2. Petitioner protests that the lower court's contractual interpretation is out of joint with this Court's pronouncements in the Steelworkers Trilogy¹ concerning the proper role of the federal courts in the area of labor arbitration. The exact argument is hard to divine since the Trilogy itself underscores the undoubted principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). The Court of Appeals, quite in keeping with that principle, studied the bargaining contract at issue here and concluded that the agreement did not contain a duty of compulsory arbitration as to safety disputes.

Much more to the point, what the lower court did was simply to carry out this Court's specific and emphatic command:

"When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, *the District Court may issue no injunctive order unless it first holds that the contract does have that effect. . . .*"

Boys Markets, supra, 398 U.S. at 254 (emphasis added). Careful inspection of the bargaining agreement, to see whether a particular dispute is in fact required to be settled by arbitration, is particularly important in the *Boys Markets* setting. For what is at stake in that situation is the employees' right to stop work free

¹ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

of injunctive interference by the federal courts, a right protected by the anti-injunction provisions of the Norris-LaGuardia Act. 29 U.S.C. §§ 101, *et seq.* To be sure, that federal statutory right is not absolute, and *Boys Markets* teaches that it must yield in a proper case to the countervailing federal policy of protecting those private agreements that do call for peaceable resolution of disputes through the arbitral process. The obvious point is that a labor injunction cannot issue absent a sufficient contractual predicate, for otherwise the sacrifice of Norris-LaGuardia rights is without justification and would run counter to this Court's admonition in *Boys Markets*:

“Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act.”

398 U.S. at 253.

Petitioner and *amici* herein argue in effect that judicial caution must be thrown to the winds whenever an employer prays for a labor injunction, cites *Boys Markets*, and suggests any barely tenable theory why the dispute in question might fall within a contractual duty to arbitrate. Anything less, apparently, is thought to violate the “presumption of arbitrability” set up by the Steelworkers Trilogy. It is worth remembering that the relief sought in the Trilogy was specific performance of the parties’ duty to arbitrate, *not* an injunction against concerted employee activity protected by Norris-LaGuardia. In the latter situation, which is the situation in *Boys Markets* and in the case at hand, some greater measure of judicial caution would seem appropriate, since it is “the task

of the courts to accommodate" the special policy of the Act. *Id.* at 251. But in any event, before a court interferes coercively on the theory that a contractual duty to arbitrate has been breached, it must first assess the bargaining contract and exercise an independent judgment on the question whether such a contractual duty in fact exists. Petitioner's approach would transform the federal judiciary into an injunction-granting machine, an unseemly role at the best of times and one that would subvert the cautious and sensitive accommodation of conflicting federal policies struck by *Boys Markets*.

It is particularly instructive in this regard that petitioner is unable to show that the decision below conflicts with that of any other federal court.² Proper administration of *Boys Markets* requires that a contractual predicate for injunctive interference be made out in each case, and the decision below is in line with the normal practice of every reviewing court.

3. Petitioner contends that the decision below involves an authoritative interpretation of section 502 of the Labor-Management Relations Act, 29 U.S.C. § 143, when in fact this case turns on the interpretation of specific provisions of a private labor contract, now superseded.

It is true that section 502 provides helpful guidance in deciding whether disputed contractual language

² Petitioner asserts that *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565 (C.A. 8, 1972), conflicts "in principle" with the decision of the court below. The *Hanna* court, however, specifically considered the Third Circuit's ruling herein and concluded that "[t]he instant case is clearly distinguishable." *Id.* at 567-568, n. 2.

makes safety walkouts permissible or not. That provision of the Taft-Hartley Act states:

“... nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this act.”

Section 502 expresses overriding congressional policy and qualifies section 301 of the same Act, 29 U.S.C. § 185, which for the first time made labor agreements enforceable in the federal courts.³ Thus, whenever a walkout falls within the specific protection of section 502, an employer cannot procure a labor injunction even though (a) the agreement contains an express no-strike obligation and (b) the underlying dispute is subject to compulsory arbitration. See, e.g., *Philadelphia Marine Trade Assn. v. NLRB*, 330 F.2d 492 (C.A. 3, 1964), *cert. denied*, 379 U.S. 833 and 841; *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (C.A. 6, 1957), *cert. denied*, 357 U.S. 927 (1958). But the court below had no occasion to decide whether section 502 had independent application to the facts herein, since it held that there was no contractual duty to arbitrate in the first place, and the question whether such a duty would nonetheless be excused by section 502 did not arise.

In short, in this case section 502 serves the quite limited function of aiding the court in interpreting disputed contractual language. Naturally contracts should be construed in line with public policy when that is reasonable. Here, the construction that makes

³ Petitioner of course brought this suit under section 301.

most sense from the neutral perspective of contract law principles also comports with the congressional policy expressed in section 502. Petitioner's contentions to the contrary notwithstanding, it is hard to believe that the policies of section 502 should be ignored in such circumstances.

There may well be unresolved questions concerning the independent scope of section 502 that in time should command this Court's attention. Petitioner seems to be concerned in particular that the purely "subjective" whim of employees may come to be honored as a matter of section 502 law. The danger appears remote in the extreme, but in any event the dread day is in no way advanced by the decision below. First—and to repeat—the privilege accorded safety walkouts by the lower court is a contractual privilege, not one founded on federal statutory law. The scope of the privilege is a matter for collective bargaining. Second, this is not a case in which the "subjective" caprice of employees was held to govern. The record contains a multitude of "objective" facts which gave rise to the miners' intense, honest, reasonable, good faith fear for their own safety and to their willingness to forfeit their pay rather than submit to working conditions they rightly regarded as intolerable.⁴ Finally, this aspect of the case is not an appropriate object of this Court's reviewing powers, turning as it does on the sifting and weighing of highly particular factual elements.

⁴ Among the "objective" facts emphasized by the court below are the foremen's failure to carry out safety procedures; their criminal prosecution for falsification of safety records, and their *nolo* pleas; prior complaints about their unsafe practices; the emergency condition that resulted from their willful misconduct in the present case; and Gateway's failure to take corrective action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

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Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The temporary restraining order issued by the District Court for the Western District of Pennsylvania (App. A, pp. 1a-4a)¹ is reported at .. F. Supp. ..., 80 LRRM 2633. The District Court's memorandum and order (App. B, 5a-10a) converting the temporary restraining order into a preliminary injunction is reported at .. F. Supp. ..., 80 LRRM 2634. The opinion

1. The opinions and orders of the District Court and Court of Appeals and the umpire's decision and award are printed as appendices to the Petition for Writ of Certiorari and have not been separately reprinted in the Appendix. They are hereafter designated as "App. ..., p. ..." The designation "A. ..." refers to the printed Appendix filed pursuant to Supreme Court Rule 36.

Questions Presented.

of the United States Court of Appeals for the Third Circuit (App. C, pp. 12a-24a) is reported at 466 F.2d 1157.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1972 (App. D, pp. 25a-26a). A petition for rehearing, timely filed, was denied on August 30, 1972 (App. E, pp. 26a-27a). The Petition for Writ of Certiorari was filed November 28, 1972, and was granted February 26, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was by virtue of 29 U.S.C. §185.

QUESTIONS PRESENTED

1. Does the strong federal policy favoring arbitration of industrial disputes apply to safety disputes or is there a presumption that safety disputes are not arbitrable?

2. Does a federal court have authority under *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), to enjoin a strike over a safety dispute and order arbitration of the underlying dispute or is the *Boys Markets* decision limited to economic disputes not involving safety?

3. Where a union relies upon the "abnormally dangerous conditions" provision of Section 502 of the Labor-Management Relations Act as justification for a work stoppage, must it present ascertainable, objective evidence to support its contention that its members

Statutes Involved.

have a good faith belief that an abnormally dangerous condition exists or is it sufficient for the union merely to present evidence that the employees believe such a condition exists?

4. Does the protection of Section 502 of the Labor-Management Relations Act extend to employees not physically located at or near an alleged abnormally hazardous condition for work?

STATUTES INVOLVED

This case involves the interpretation and application of Sections 203(d), 301(a) and 502 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136 et seq. U.S.C. §141 et seq. (hereinafter "the Act"). They are printed in Appendix F to the Petition for Certiorari at pp. 27a-28a.

Statement of the Case.

STATEMENT OF THE CASE

Petitioner, Gateway Coal Company, ("Gateway") is the owner of a large underground coal mine known as the Gateway Mine, which is located in Greene County, Pennsylvania. The Gateway Mine is one of the largest, cleanest mines in the nation, with an excellent safety record (R.² 20, 147).

For many years, the approximately 550 production and maintenance workers employed in the Gateway Mine have been represented for purposes of collective bargaining by the United Mine Workers of America (the "UMW"), its administrative division, District No. 4, United Mine Workers of America ("District 4") and Local Union No. 6330 ("Local 6330"). At all times material to these proceedings, the collective bargaining agreement in effect between the parties was the National Bituminous Coal Wage Agreement of 1968. (P. Ex. 1; R. 185-211). The "Settlement of Local and District Disputes" provision of that agreement contains a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final and binding arbitration of "differences between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and "... differences . . . about matters not specifically mentioned in [the]

2. Two almost identical appendices (except for page numbers) were filed with the Court of Appeals, one by the United Mine Workers and its District No. 4 and the other by Local No. 6330. By agreement of the parties and for the convenience of the Court, the Appendix filed by Local No. 6330 has been designated as the record and all references to it in this brief will be cited as "R."

Statement of the Case.

agreement . . ." and " . . . any local trouble of any kind [arising] at the mine . . ." (A. 13a).

On April 15, 1971, shortly before the daylight shift change, a machine operator and his foreman working in the "5 face" area of the Gateway mine discovered that the flow of air in that area was 11,000 cubic feet per minute, as compared with a usual air flow of 28,000 cubic feet per minute (R. 15, 18, 59, 64-69). Although the air flow was reduced in this one work area of the mine, there was still an adequate supply of air, which was substantially above the state ventilation requirement of 6,000 cubic feet per minute³ and the federal requirement of 9,000 cubic feet per minute⁴ (R. 14-15, 55, 64-67).

The problem was traced to a partial blockage of an intake airway which is believed to have occurred at about 4:30 a.m. on April 15⁵ (R. 14, 53, 72). Repairs

3. Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, (52 P.S. §701-242(b)).

4. Federal Coal Mine Health and Safety Act of 1969, §303 (b) 83 Stat. 742, 30 U.S.C. §863 (b) Art. II, §242 (b).

5. Because of Gateway's policy of providing three to five times the amount of air flow required by state and federal standards and the fact that the remaining four intake airways were unaffected by the partial blockage, the reduction in air flow was not noticed by the three foremen working in the "5 face" area or by their crews (R. 14-15, 19-20, 55, 65-67). No miner complained of coal dust in the air, and the machine operators, union members required by law to check for methane gas every twenty minutes as part of their regular duties, detected no variation from the normal methane level in the mine of two tenths of one percent (R. 17-19, 62-64). Federal law permits methane accumulations of up to one percent when electrical equip-

Statement of the Case.

were made immediately and normal air flow was restored (R. 20, 145-146).

The miners on the first shift, who had been instructed by the Company to stand by on the surface until the repairs were completed, returned to work underground (R. 20). In the interim, however, approximately 100 of the 226 day shift employees disregarded the Company's instructions and went home (R. 20).

Work in the mine proceeded without incident until the following morning when the company refused the union's request for reporting pay for April 15 for those miners who had ignored the company's instruction that they stand by until repairs were completed (R. 20). The company's offer to arbitrate the reporting pay dispute was rejected and the miners struck (R. 21-22).

On April 17, pursuant to a request by the union made after the strike had started over the reporting pay issue, federal and state inspectors visited the mine to determine the adequacy of the repairs (R. 22-23, 152). In the course of this investigation, it was discovered that three third-shift foremen had failed to record any reduction in air volume in connection with the pre-shift examination which each conducted between 5 a.m. and 8 a.m. on April 15 (R. 71, 54). The company suspended two of the foremen pending its own investigation of the matter, but decided against suspending the third foreman because he had reported the trouble (R. 22, 54-55, 83-85).

ment is being operated. Federal Coal Mine Health and Safety Act of 1969, §303(h), 83 Stat. 742, 30 U.S.C. §863(h). A methane concentration of from five to fifteen per cent is necessary before an explosion in the mine is possible (R. 16-17, 65-67).

Statement of the Case.

On April 18 the Gateway miners held a special meeting, attended by about 200 men, at which the membership was advised about the inspection of the previous day (R. 136-137, 155). The safety committee reported that the state inspector had seized the foremen's records, but the miners were not informed that the mine had been declared safe by both state and federal mine inspectors (R. 155-157). A motion was passed that the members would not return to work unless all three foremen were suspended (R. 141-142, 157).

When notified of the union's position, the company reluctantly agreed to suspend the third foreman who had reported the trouble, pending investigation of the situation, but advised the union that the foremen would be returned to work when their certification status was clarified by the Commonwealth of Pennsylvania (R. 28, 99-102). The company was aware that consideration was being given by the state to the initiation of decertification proceedings, which would mean that the foremen could no longer serve as supervisors in the mine (R. 25, 89-90).

The Gateway miners returned to work on April 19 (R. 24, 112).

Subsequently, a criminal misdemeanor charge was filed against the foremen for failure to properly record air measurements in the mine⁶ (R. 52, 56). However, after investigation, the state decided against seeking to decertify the foremen. On May 29, the company received a copy of a letter addressed to the union from the Pennsylvania Department of Environmental Resources

6. Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, Art. II, §226 (52 P.S. §701-226).

Statement of the Case.

advising the union that in view of the satisfactory record and good performance of the foremen and the pending criminal action, the state had decided that no action should be taken to decertify the foremen and that the "company is at liberty to return the three (3) assistant foremen to work if it so desires" (P. Ex. 2; A. 16a-17a).

The company reinstated two of the foremen (one had retired while on suspension) and scheduled them for work on the midnight shift on June 1, the first regular shift following receipt of the letter from the state (R. 26-29, 90-95). When this occurred, the miners on all three shifts, including those men who worked on the surface, struck the Gateway mine (R. 13-14, 29-30, 106-107).⁷ They did not at that time invoke the assistance of the federal and state mine inspectors, both of whom had the power to order the men withdrawn from the mine if they found an imminent danger.⁸ Moreover, at no time did the mine safety committee invoke or follow the procedures of the Mine Safety Pro-

7. The work stoppage at the Gateway mine was soon extended to the Vesta 4, Vesta 5, and Shannopin mines owned by Jones & Laughlin Steel Corporation. These mines were "picketed out" by members of Defendant Local 6330 from the Gateway mine from June 3, 1971 to June 16 1971 when J & L employees returned to work in compliance with a Temporary Restraining Order issued by the District Court in the companion case of *Jones & Laughlin Steel Corporation v. Mine Workers et al*, Civil Action No. 71-566 (W.D. Pa. 1971) (unreported).

8. Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 751, § 104(a) (30 U.S.C. § 814(a)); Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, Art I § 120 (52 P.S. § 701-120).

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gram provision of the collective bargaining agreement (A. 10a-13a; App. B, p. 9a).

Gateway immediately notified the UMW of the existence of the work stoppage through the Bituminous Coal Operators' Association, Inc., of which Gateway is a member (R. 30). On June 8, the UMW advised the company that "pursuant to the policy of the organization relative to unauthorized work stoppages, the officers of the district involved have been advised to exercise every effort to have the men involved return to work" (P. Ex. 4; R. 31, 214). On the same date, the company offered to arbitrate, on an expedited basis, the question as to whether the mine was rendered unsafe by the presence of the two foremen in the mine (P. Ex. 6; A. 18a-20a). The union refused to arbitrate (R. 33-34).

When the strike continued, the company filed suit under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185 to compel arbitration of the dispute and to enjoin the strike.

After hearing, the District Court found that the dispute giving rise to the work stoppage was arbitrable under the terms of the labor agreement and that the strike violated the agreement. On the basis of *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), it ordered arbitration of the underlying dispute but directed that the foremen be suspended pending the outcome of the arbitration, and enjoined the Gateway employees from continuing their work stoppage (App. A, pp. 1a-4a; App. B, pp. 9a-10a). Thereafter, the impartial umpire ruled that the dispute was arbitrable even though it involved a safety claim; that the position of the Gateway employees in refusing to work with the

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two foremen was unfounded; that their presence in the mine did not render the mine unsafe; and that the union safety committee had acted arbitrarily and capriciously in causing the work stoppage (App. G, pp. 29a-51a).

The Court of Appeals for the Third Circuit, in a two-to-one decision, reversed the judgment of the District Court and vacated the preliminary injunction.

The Court of Appeals concluded that the strike at the Gateway mine was not enjoinable because, in its view, the dispute giving rise to the work stoppage was not arbitrable. Despite the extremely broad arbitration clause, the Court of Appeals held that the dispute as to whether the mine would be rendered unsafe by the continued presence of the foremen was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (App. C, p. 16a).

The Court of Appeals refused to apply the strong federal policy favoring arbitration, a view which it said was supported by Section 502 of the Labor-Management Relations Act of 1947. Safety disputes, it concluded, are "*sui generis*", and public policy "should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C., pp. 16a-18a).

The Court of Appeals also held that this Court's decision in *Boys Markets*, *supra*, was inapplicable because it involved "an economic dispute, not involving safety" (App. C., p. 18a, n.1).

The Court of Appeals concluded that, under Section 502, the miners themselves were entitled to make

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a subjective determination as to what constituted a safety hazard and that it was unnecessary for the union to prove by objective evidence that an abnormally dangerous condition did in fact exist (App. C, pp. 14a, 17a-18a).

Judge Rosenn, dissenting, expressed serious reservations that a good faith safety dispute underlay the strike enjoined by the District Court, but noted that "[w]hatever the probative weight of the evidence the union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration" (App. C. p. 21a). Judge Rosenn indicated particular concern with the majority's failure to require ascertainable, objective evidence that an abnormally dangerous condition for work exists, stating that "[a]cceptance of anything less by a court would be an abdication of its judicial role" (App. C, p. 22a).

Judge Rosenn found that the alleged dispute fell squarely within the language of the arbitration clause of the contract and was not excluded from arbitration by any other provision, and that for a court to order the matter to arbitration was harmonious with the policies underlying the Act and would provide for a final resolution of the dispute not inconsistent with Section 502 (App. C, pp. 23a-24a).

Finally, Judge Rosenn pointed out that "[v]acating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971" (App. C, p. 24a).

*Summary of Argument.***SUMMARY OF ARGUMENT**

This case raises important questions concerning the interplay between Sections 203(d), 301, and 502 of the Labor-Management Relations Act of 1947 as well as the Federal Coal Mine Health and Safety Act of 1969 and the Occupational Health and Safety Act of 1970.

Peaceful resolution of industrial disputes through arbitration is the keystone of our federal labor policy. The holding of the Court of Appeals that this policy is inapplicable to safety disputes is not only contrary to Section 203(d) but is in direct conflict with the *Steelworkers Trilogy*.

Contrary to the clear dictates of *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), the Court of Appeals ruled that the safety dispute in question was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to arbitration" (App. C., p. 16a). Thus, the Court of Appeals established a novel presumption of non-arbitrability for disputes involving safety.

The Court of Appeals claimed to find justification for this presumption of non-arbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947, but this Section does not specifically or by implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view that safety disputes are "*sui generis*" and are to be treated differently than any other kind of grievance dispute.

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Arbitration of safety claims is clearly compatible with Section 502, which must be read in *pari materia* not only with Section 301 but also with Section 203(d) of the Labor-Management Relations Act of 1947.

This view is clearly supported by other federal legislation dealing specifically with industrial safety — the Federal Coal Mine Health and Safety Act of 1969 and the Occupational Safety and Health Act of 1970. These statutes contemplate a joint labor-management effort to reduce health and safety hazards, including the use of the grievance-arbitration procedure for resolution of such disputes and third-party determinations as to the existence and severity of claimed safety hazards. These statutes contemplate that safety disputes are to be settled peaceably among the parties without disruptive resort to self help and costly work stoppages.

One of the fundamental errors of the Court of Appeals was in reading Section 502 in isolation, without attempting to harmonize or accommodate its policies to those of Section 203 (d) and 301 or to the subsequently enacted provisions of the two statutes dealing with employee health and safety.

The holding of the Court of Appeals that safety disputes are "*sui generis*" is based upon its erroneous assumption that such disputes are rarely, if ever, arbitrated. There are many reported arbitration decisions dealing with the right of employees to refuse to work under allegedly hazardous conditions. Moreover, although Gateway has never arbitrated a safety issue before, other companies covered by the same agreement have done so. The presumption of non-arbitrability of safety disputes created by the Court of Appeals will pre-

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vent the parties from utilizing this means of peacefully resolving such disputes, thereby nullifying the intent of Congress.

Having found that the dispute concerning the foremen was arbitrable and that the June 1 work stoppage violated the labor agreement, the District Court properly enjoined the work stoppage and directed arbitration of the dispute under *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970). The Court of Appeals, however, erroneously concluded that *Boys Markets* is limited in its application to economic disputes not involving safety.

While the collective bargaining agreement does not contain a specific no-strike clause, the work stoppage violated the labor agreement since it was over an arbitrable dispute: *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

The decision of the Court of Appeals also directly conflicts with *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960) in failing to give binding effect to the arbitrator's award on the safety issue. The rationale of the Court of Appeals for ignoring the award was that "there is no sound reason for requiring [employees] to subordinate their judgment [as to the safety of the work place] to that of an arbitrator" (App. C., p. 17a). However, Congress on a number of occasions has legislated that the judgment of employees on matters of safety must be subordinated to that of an impartial third party or tribunal.

The Court of Appeals also erred in holding that the strike of the Gateway miners was protected under Section 502 "because of their good faith apprehension of

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physical danger" (App. C., p. 17a). Until the *Gateway* decision, the cases interpreting Section 502 have uniformly held that, to justify a work stoppage over unsafe conditions, the union must present ascertainable, objective evidence that an abnormally hazardous condition did in fact exist. In *Gateway* the Court of Appeals constructed a subjective test for determining whether the work stoppage is entitled to protection under Section 502.

The ruling of the Court of Appeals makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court. Such an interpretation of Section 502 is an open invitation to chaos and instability of labor relations because it will permit a union to create a "safety" dispute as a pretext to justify an illegal work stoppage, as the union did in this case since the safety issue only arose after the dispute on reporting pay occurred.

Finally, it is clear that since the two foremen involved in the dispute worked in the mine on the third shift, the Court of Appeals improperly extended the protection of Section 502 to strikers on the first and second shifts and to those who worked on the surface.

Argument.**ARGUMENT**

- I. The Court of Appeals Erred in Holding that the Strong Federal Policy favoring Arbitration of Industrial Disputes does not apply to Disputes alleged to be Over Safety.**

The decision of the Court of Appeals that the federal labor policy favoring arbitration of industrial disputes is inapplicable to safety disputes is contrary to Section 203(d) of the Labor-Management Relations Act of 1947 and is in direct conflict with the applicable decisions of this Court interpreting and applying the federal labor policy set forth in this Section of the Act.

- A. PEACEFUL RESOLUTION OF INDUSTRIAL DISPUTES THROUGH ARBITRATION IS THE KEYSTONE OF FEDERAL LABOR POLICY.**

Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In the 25 years since the enactment of Section 203(d), and particularly since the decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court has formulated an expansive body of federal labor law grounded upon the basic premise of Section 203(d) that industrial stability is best fostered by the substitution of arbitration for industrial strife.

This cornerstone of federal labor policy was most thoroughly expounded in the 1960 opinions of the *Steel-*

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workers Trilogy.⁹ As was stated in *Steelworkers v. Warrior & Gulf*, 363 U.S. at page 578, n. 4:

"Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the '*quid pro quo*' for the agreement not to strike."

When application is made to a federal court for the enforcement of labor agreements under Section 301 of the Act, continued the Court,

"... An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 282-283.

The presumption of arbitrability set forth in *Warrior & Gulf* has been uniformly applied by the federal courts in the interpretation of collective bargaining agreements — until the instant case.

Faced with the union's assertion that the presence of two foremen in the Gateway mine constituted a "safety hazard", the Court of Appeals erroneously deviated from the clear dictates of *Warrior & Gulf* and established a novel presumption of non-arbitrability for disputes involving safety. Stated the Court, "It is

9. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

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neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (App. C., 16a). Thus, the Court of Appeals ignored this Court's holding in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960) that the federal labor policy set forth in Section 203 (d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

It would be difficult to write a broader arbitration clause than the one involved in this case. It is strikingly similar to the arbitration provision interpreted by this Court in *Warrior & Gulf*. It not only provides for arbitration of differences as to the "meaning and application of the provision of [the] agreement" but also for arbitration of "differences . . . about matters not specifically mentioned in [the] agreement" as well as "any local trouble of any kind [arising] at the mine" (A. 13a; R. 199). As in *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), "[t]here is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration." Moreover, in another section of the contract, the parties specifically agreed that all unresolved disputes, unless national in character, would be settled "by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement . . ." (A. 13a; R. 207).

Thus, the decision of the Court of Appeals failed to give "full play" to the means the parties chose for the resolution of the alleged safety dispute.

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B. SECTION 502 OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 DOES NOT REQUIRE A REVERSAL OF THE FEDERAL POLICY FAVORING ARBITRATION WHERE DISPUTES OVER SAFETY ARE INVOLVED.

The Court of Appeals claimed to find justification for its presumption of non-arbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947, which provides in relevant part that:

"... the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act."

It erroneously reasoned that "the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C, p. 18a). However, Section 502 does not specifically nor by necessary implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view of the Court of Appeals that safety disputes are "*sui generis*" and are to be treated differently than any other kind of grievance disputes. (Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948) 29, 156, 290, 436, 573, 895.) In *Steelworkers v. American Mfg. Co.*, *supra*, this Court said (363 U.S. at 567):

"Arbitration is an stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement." (Emphasis added)

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Arbitration of safety claims is clearly compatible with Section 502, which must be read *in pari materia*, not only with Section 301 but with Section 203(d), since all three sections are part of the same chapter of the Labor-Management Relations Act of 1947. As Judge Rosenn aptly observed in his dissenting opinion:

"... section [502] requires a third party, a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision." (App. C, p. 23a)

C. OTHER FEDERAL LEGISLATION DEALING SPECIFICALLY WITH INDUSTRIAL SAFETY SUPPORTS THE CONCLUSION THAT SAFETY DISPUTES ARE TO BE RESOLVED BY PEACEFUL MEANS RATHER THAN ECONOMIC WARFARE.

What the Court of Appeals overlooked is the fact that Congress also has made clear in other federal legislation specifically concerned with problems of industrial health and safety that disputes concerning safety should be peacefully resolved by labor and management through joint labor-management efforts and by arbitration, if necessary, rather than by economic warfare.

The Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Coal Mine Act"), 83 Stat. 742, 30 U.S.C. §801, *et seq.*, and the Occupational Safety and Health Act of 1970, ("OSHA"), 84 Stat. 1590, 29 U.S.C. §651,

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et seq. both contemplate a joint labor-management effort to reduce health and safety hazards.¹⁰ They empower federal inspectors to make independent third-party determinations as to the existence and severity of hazards in the work place and to require the removal of employees in the event the hazard is such as could reasonably be expected to cause death or serious physical harm before it can be abated.¹¹

It is precisely this type of independent third-party determination which the Court of Appeals felt that employees subject to a possible hazard should not be required to accept because of Section 502. (App. C, 17a).

Perhaps the strongest evidence of congressional policy that safety disputes should be settled peaceably among the parties without disruptive resort to self-help and costly work stoppages is the legislative history relating to the inclusion in both OSHA and the 1969 Coal Mine Act of provisions which permit employees, or their collective bargaining representative, to request inspection of the work place by federal inspectors any time they believe a hazard exists. This provision is contained in Section 8(f)(1) of OSHA (Appendix A, *infra*) and Section 103 (g) of the 1969 Coal Mine Act (Appendix B, *infra*).

Speaking of Section 8(f) of OSHA as enacted, sponsor Senator Williams of New Jersey noted:

10. Federal Coal Mine Health and Safety Act of 1969, §2(e) (30 U.S.C. §801 (e)); OSHA, §2(b)(1) and (13) (29 U.S.C. §651 (b)(1) and (13)).

11. Federal Coal Mine Health and Safety Act of 1969, §§103, 104 (30 U.S.C. §§813, 814); OSHA §§8, 9, 10, 11, and 13 (29 U.S.C. §§657, 658, 659, 660, and 662).

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"... Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." Leg. Hist. of the Occupational Safety and Health Act of 1970 p. 416 (G.P.O. 1971).

Congressman Steiger of Wisconsin, co-sponsor of the Act with Senator Williams, emphasized that it was not intended that the "inspection upon request" provision be misused by employees or their collective bargaining representatives:

"It is expected that the Secretary will use his good judgment in determining whether there are reasonable grounds to believe that a violation exists and will not permit this procedure to be used as an harassment device." Leg. Hist. of the Occupational Safety and Health Act of 1970, p. 1219 (G.P.O. 1971).

The fear that safety and health legislation might be misused by employees — in contravention of the national labor policy that disputes be settled peacefully — was forcefully expressed several times during congressional debate. In his comments upon an alternative bill (H.R. 16785) which was ultimately rejected by the House, Congressman Michel of Illinois noted:

"If H.R. 16785 passes as is, it will add more fuel to the fire in an already turbulent labor arena. Unions could and would use H.R. 16785 to disregard the no-strike provisions in collective agree-

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ments. Further, even if union officers were against a local strike, 'red hot' rank-and-file members could and would disregard their contractual no-strike pledge." Leg. His. of the Occupational Safety and Health Act of 1970, p. 1050 (G.P.O. 1971).

Similar fears were voiced by Congressman Scherle of Iowa immediately prior to the final House vote on the Act. Leg. Hist. of the Occupational Safety and Health Act of 1970, p. 1223-1224 (G.P.O. 1971).

The congressional intent that disputes over safety are to be settled peaceably among the parties, without resort to disruptive work stoppages, is further evidenced by the declared policy of the Occupational Safety and Health Administration, which is charged with the responsibility for administering OSHA, that conciliation between management and labor and utilization of contract grievance procedures should be undertaken to eliminate alleged hazards before federal inspectors are called in by employees or their representative. OSHR, No. 37, pp. 751-752 (BNA January 13, 1973).

In *Steelworkers v. Warrior & Gulf Mfg. Co.*, 363 U.S. 574 (1960) this Court said at page 578:

"The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

Thus, the intent of Congress as expressed in the 1969 Coal Mine Act and in OSHA that safety disputes are to be resolved by peaceful means is clearly consistent with, and an amplification of, the earlier, more gen-

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eral congressional policy that industrial disputes are to be resolved by arbitration. Since many labor agreements now incorporate by reference the terms of OSHA and the Coal Mine Act of 1969 (when applicable), the decision of the Court of Appeals will prevent the parties from using arbitration as a prompt and expeditious means of peacefully resolving disputes which may arise as to the interpretation and application of these important statutes.

One of the fundamental errors of the Court of Appeals was in reading Section 502 in isolation, without attempting to harmonize or accommodate its policies to those of Section 203(d) and Section 301 of the Labor-Management Relations Act of 1947 or the subsequently enacted provision of the 1969 Coal Mine Act and OSHA. Such an accommodation process would clearly have been appropriate: *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) (Section 4 of Norris LaGuardia Act accommodated to Section 301 of Labor-Management Relations Act); *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30 (1957) (Norris-LaGuardia Act accommodated to Railway Labor Act).

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- D. THE HOLDING OF THE COURT OF APPEALS THAT SAFETY DISPUTES ARE "SUI GENERIS" AND NOT SUBJECT TO THE ORDINARY PRESUMPTION IN FAVOR OF ARBITRABILITY NULLIFIES THE INTENT OF CONGRESS THAT SUCH DISPUTES BE RESOLVED WITHOUT RESORT TO STRIKES.

In holding that safety disputes are "*sui generis*" and, thus, require a presumption of non-arbitrability, it is apparent that the Court of Appeals assumed that safety disputes are rarely, if ever, arbitrated. This assumption has no basis.

In a review of the arbitration provisions contained in major collective bargaining agreements in effect in 1961-1962, the Department of Labor, Bureau of Labor Statistics, found that out of 1609 agreements studies which contained grievance arbitration provisions, only nine such agreements specifically excluded questions of health and safety from arbitration. Bureau of Labor Statistics, *Arbitration Procedures*, pp. 7, 12 (G.P.O. 1966).¹²

This statistic alone indicates that management and labor alike have recognized the need for rapid and peaceful settlement of disputes concerning the health and safety of the work place.

Equally important is the fact that some labor agreements specifically declare that safety disputes are subject to arbitration¹³ — in contrast to the unwarranted assumption of the Court of Appeals that such would be

12. Out of the agreements surveyed 1,537 contained a no-strike, no-lockout provision of some form. *Arbitration Procedures*, *supra*, p. 84.

13. In addition, a number of other contracts provide safety and health disputes are subject to the griev-

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"the unlikely case." (App. C., p. 18a n.1). Perhaps the most prominent of these agreements is the basic steel agreement between the United Steelworkers of America and the major steel companies. For more than 25 years this agreement has provided in Section 14(c) for the arbitration of disputes concerning grievances of employees "who believe they are being required to work under conditions which are unsafe or unhealthy beyond the normal operations in question." The Steelworkers are the third largest union in the nation, with a membership of approximately 1,200,000. Bureau of Labor Statistics, *National Directory of Unions and Employee Associations, 1971*, Bull. No. 1750, p. 44 (G.P.O. 1972).

The fact that labor and management have traditionally chosen arbitration as the means of effectuating a settlement of safety disputes, either by implication or by explicit language, is also reflected by the large number of reported arbitrators' decisions dealing with a wide variety of safety questions, including many cases dealing with the right of employees to refuse to work under allegedly hazardous conditions.¹⁴ In some of these

ance procedure but not compulsory arbitration. See *Arbitration Procedures, supra*, p. 18.

14. The Bureau of National Affairs, *Labor Arbitration Reports*, has a specific key number for arbitration cases dealing with general safety and health disputes (§124.70) and another key number (§118.658), in which cases dealing with discharge or discipline for refusal to work under allegedly hazardous conditions are collected. Similarly, under the topic heading "Safety" the Topical Index-Digest to Commerce Clearing House, *Labor Arbitration Awards*, contains an extensive collection of reported arbitration decisions on safety issues, including many dealing with claimed hazardous working conditions.

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cases, the arbitrator, on the basis of objective evidence, found that a hazardous condition existed and ordered that it be corrected.¹⁵ In other cases, using the same test, the arbitrator found that the safety argument was a mere pretext to justify otherwise illegal conduct.¹⁶

More important with regard to the instant case, however, is the fact that safety disputes have been arbitrated under the very labor agreement here in issue, the National Bituminous Coal Wage Agreement of 1968. As pointed out at p. 16 of the Amicus Curiae brief on the merits on behalf of the Bituminous Coal Operators' Association, Inc., over 40 umpire's decisions relating to safety and health disputes have been reported by BCOA members in the past three years.

This statistic, and the traditional practice of arbitrating safety issues, stands in stark contrast to the unverified statement of the Court of Appeals that the witnesses who testified "did not know of any case in which a disagreement on a safety matter had been handled through arbitration." (App. C. 16a).

We respectfully suggest that examination of the record will indicate there is no testimony as to a safety dispute between the instant parties which *has not* been settled peaceably through the grievance-arbitration procedure. As any person experienced in the field of deep mining knows, the union mine safety committee traditionally reports areas of dispute over health and safety to management, and such disputes are resolved through

15. *Paragon Bridge and Steel Co.*, 64-2 ARB ¶8441 (Gross, 1964).

16. *Stokley-Van Camp, Inc.*, 60 LA 109 (Karasick, 1973).

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the contract procedure daily. Clearly, the fact that no Gateway safety issue has been arbitrated before the present dispute does not establish that such disputes are not arbitrable under the terms of the National Bituminous Coal Wage Agreement.

It should be emphasized that the Court of Appeals' holding that safety disputes are not subject to arbitration cuts two ways. In this case, it means that the employer, Gateway, is powerless to require the Union to arbitrate rather than strike over the dispute concerning the two foremen. However, the decision also means that a union, which has no desire to strike, cannot compel an employer to arbitrate a safety dispute if the employer chooses not to do so, and this may well leave the union without any effective method of remedying the situation. Thus, the conclusion of the Court of Appeals that "a court [should] reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C, p. 18a) clearly operates to prevent the parties from utilizing this means of peacefully resolving disputes alleged to be over safety, thereby nullifying the intent of Congress that such disputes be resolved without resort to costly strikes and work stoppages.

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II. The District Court Had Authority Under *Boys Markets, Inc. v. Retail Clerks* to Enjoin a Strike Allegedly Over Safety and to Order Arbitration of the Underlying Dispute.

Having found that the dispute concerning the foreman was arbitrable, and that the June 1 work stoppage over this dispute violated the labor agreement, the District Court properly enjoined the work stoppage and directed arbitration of the dispute, in reliance upon *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

In the *Boys Markets* case, this Court expressly overruled its earlier decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and held that a federal court has jurisdiction under Section 301 to enjoin a strike over an arbitrable grievance. It did so because *Sinclair* stood as a significant departure from this Court's "otherwise consistent emphasis upon the congressional policy to promote peaceful settlement of labor disputes through arbitration . . ." (398 U.S. at 241). Viewed in this light, there simply is no basis for the conclusion of the Court of Appeals that *Boys Markets* is limited in its application to "an economic dispute, not involving safety" (App. C., p. 18a, n.1).

The decision of the Court of Appeals is also in direct conflict with the decision of this Court in *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). In the *Lucas Flour* case, this Court held that where, as here, there is a strike over a dispute which is subject to resolution under the arbitration clause of a labor agreement, the work stoppage constitutes a violation of the collective bargaining agreement even when the agreement does not contain an explicit no-strike clause. The Court con-

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cluded that "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." 369 U.S. at 105.

Despite the absence of an express no-strike clause in the National Bituminous Coal Wage Agreement, ever since *Lucas Flour*, lower courts have consistently implied an agreement not to strike over arbitrable disputes: *Blue Diamond Coal Co. v. Mine Workers*, 436 F. 2d 551 (6th Cir. 1970); *Old Ben Coal Corp. v. Mine Workers*, 457 F. 2d 162 (7th Cir. 1972); *United States Steel Corporation v. Mine Workers*, 320 F. Supp. 743, 746 (W.D.Pa. 1970); *United States Steel Corporation v. Mine Workers*, 77 LRRM 3134 (E.D. Ky. 1971).¹⁷

The decision of the Court of Appeals that a strike over a safety dispute is not enjoined will have a devastating impact on the stability of labor relations. Dissenting Judge Rosenn recognized quite clearly the potential unsettling effect of the majority opinion when he said:

"... If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or

17. The decisions upon which the Union will rely in support of its contention that the Gateway miners were free to strike, *United Mine Workers v. NLRB*, 257 F. 2d 211 (D.C. Cir. 1958) and *Mile Branch Coal Co. v. Mine Workers*, 286 F. 2d 822 (D.C. Cir. 1961), cert. den., 365 U.S. 871 (1961) were both decided before the *Lucas Flour* case. No court which has considered the question since then has adopted the rationale of these earlier decisions.

Argument.

court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." (App. C, p. 22a).

For this reason, the present case is of the utmost importance and concern, not only to Gateway and other signatories to the National Bituminous Coal Wage Agreement, but to all other employers and labor unions. While most labor agreements now contain a provision for arbitration of grievances, relatively few contain a specific provision making safety disputes arbitrable¹⁸ and even in that event, the decision of the Court of Appeals raises serious doubt as to the employer's right to injunctive relief against wildcat safety strikes.¹⁹

Unless a federal court can enjoin a work stoppage over an alleged safety dispute and order arbitration of

18. See pp. 25-26, *supra*.

19. The Court of Appeals in the footnote in which it held *Boys Markets* to be inapplicable to safety disputes went on to state:

"It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoined." (App. C, p. 18a, n.1)

Hanna Mining Co. v. Steelworkers, 464 F.2d 565 (8th Cir. 1972), while distinguishable on its facts, clearly conflicts in principle with the *Gateway* decision on this issue.

Argument.

the underlying dispute, as the District Court did in this case on the basis of *Boys Markets*, how are such disputes to be resolved? The answer of the Court of Appeals—that they are to be settled on the picket line—is hardly in keeping with the congressional policy enunciated in Section 203(d) and is a result neither contemplated by Section 301 nor required by Section 502.

If safety questions are to be so resolved, the outcome necessarily must rest upon the relative economic strength of the combatants. Where the parties' resources are unequal, there is no assurance whatever that the ultimate resolution of the conflict will in any way reflect the socially desirable result of insuring the safety of the employees involved. It is for this reason, among others, that our federal labor policy favors peaceful resolution of safety disputes. Thus, the holding of the Court of Appeals tends to defeat the very purpose it seeks to achieve — the protection of employees from hazards at the work place.

In short, the solution of the Court of Appeals to the problem is really no answer at all.

Argument.

III. The Decision of the Court of Appeals Conflicts With *Steelworkers v. Enterprise Corp.* in Failing to Give Binding Effect to the Arbitrator's Decision On the Safety Issue.

In *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960) this Court held that "[t]he federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards."

In the present case, an impartial arbitrator, with extensive experience in mining, determined that the dispute was arbitrable and that there was no safety hazard created by the continued presence of the foremen in the mine (App. G., p. 51a). Nevertheless, the Court of Appeals concluded that the Gateway miners should not be required to accept the arbitrator's resolution of the safety dispute even though the labor agreement provides that "the decision of the umpire shall be final" (P. Ex 1; A. 14a). It paid no heed to the admonition of this Court in *Steelworkers v. Enterprise Corp.*, *supra* at 599, that

"... the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his."

The rationale of the Court of Appeals for ignoring the arbitrator's award is entirely unconvincing. It reasoned that:

Argument.

"[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." (App. C., p. 17a).

What the Court of Appeals completely overlooked is that Congress, on a number of occasions, has legislated that the judgment of employees on matters of safety must be subordinated to that of an impartial third party or tribunal. For example, under Section 104(a) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §814(a), Congress vested federal mine inspectors with the authority to determine whether an "imminent danger"²⁰ exists such as would warrant issuance of a withdrawal order. In Section 13(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §662, Congress gave the safety inspector, the Secretary of Labor, and ultimately the Court the authority to make a similar third party determination as to the existence of an imminent danger at the place of employment. Finally, even under Section 502 of the Labor-Management Relations Act of 1947, 29 U.S.C. §143, upon which the Court of Appeals placed great emphasis, the

20. Section 3(j) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §802(j) defined "Imminent danger" to mean "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Argument.

National Labor Relations Board and the Court, rather than the employees, must decide whether "abnormally dangerous conditions for work [exist] at the place of employment . . ."

There is no reason to believe that an impartial arbitrator would be any less capable of deciding a safety claim, and, clearly, there is no overriding federal policy that employees need not subordinate their judgment on safety matters to that of an impartial third party. In reality, what the Court of Appeals has done is to set aside the arbitrator's award by substituting its own interpretation of the labor agreement for that of the arbitrator. This disregard of the award directly conflicts with the principle of finality of awards enunciated by this Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 595 (1960).

IV. The Court of Appeals Erred In Failing To Hold That, Where a Union Relies Upon Section 502 As Justification For a Work Stoppage, It Must Present Ascertainable, Objective Evidence To Support Its Claim of a Good Faith Belief That Abnormally Dangerous Conditions Exist.

The Court of Appeals held that the strike by the Gateway miners was protected activity under Section 502 of the Labor-Management Relations Act of 1947, 29 U.S.C., §143, and not enjoined "because of their good faith apprehension of physical danger." (App. C., p. 17a).

Until the present case, as Judge Rosenn pointed out in his dissent, the National Labor Relations Board and Court decisions, interpreting Section 502 have uniformly held that, to justify a work stoppage over unsafe conditions, the union must present ascertainable, objective evidence that an abnormally hazardous condition did in fact exist: *NLRB v. Knight Morley Corporation*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958); *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (3d Cir. 1964), *cert. denied*, 379 U.S. 833, 841 (1964). Thus, in *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964), it was held that a good faith belief that working conditions were abnormally dangerous is insufficient to establish that a strike was protected under Section 502 unless there was proof of physical facts to support that belief. "What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnor-

Argument.

mally dangerous'": *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961). To the same effect: *Anaconda Aluminum Co.*, 197 NLRB No. 51, 80 LRRM 1780 (1972); *Stop & Shop, Inc.*, 161 NLRB 75 (1966).

The decision of the Court of Appeals represents a clear departure from this previously uniform interpretation of Section 502 by its conclusion that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. As dissenting Judge Rosenn pointed out:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." (App. C, p. 22a)

Judge Rosenn's observation is borne out, not only by the Court of Appeals' disregard of the arbitrator's award on the disputed issue, but by its refusal to accept the results of investigations conducted by impartial federal and state agencies vested by statute with authority to make third-party determinations concerning mine safety. The federal mine inspector who inspected the mine on April 17 had the authority under Section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §814(a), to issue a withdrawal order if he determined that an imminent danger existed because of the presence of the foremen in the mine. He did not take this action. Similarly, the Commonwealth of Pennsylvania, after an impartial investigation, concluded that decertification proceedings were not appropriate and advised the parties that the company was at liberty to return the foremen to work. These facts were known to the Gateway miners before the strike,

Argument.

which originally started over a reporting pay dispute, was resumed on June 1.

Thus, the ruling of the Court of Appeals makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court.

The Third Circuit has had occasion to apply the *Gateway* doctrine in another case arising under the 1968 National Bituminous Coal Wage Agreement. In *United States Steel Corporation v. Mine Workers*, 469 F.2d 729 (3rd Cir. 1972)²¹ (Petition for certiorari filed December 27, 1972 at No. 72-930 and still pending) employees at a mine near the Gateway mine went on strike shortly after the District Court in Gateway entered its Temporary Restraining Order in which, *inter alia*, it directed Gateway to suspend the two foremen again pending arbitration of the safety dispute. There the claim was that an assistant mine foreman had failed to "show proper concern for mine safety." In vacating the preliminary injunction entered by the District Court, the Court of Appeals made it crystal clear that its *Gateway* decision stands for the proposition that a subjective, rather than an objective, test must be applied in determining if a work stoppage is entitled to protection under Section 502 when it said at page 729:

"The entire thrust of [the *Gateway*] decision was that it is the miners themselves who should make

21. One member of the panel (Senior Judge Layton) concurred only because he felt bound by the majority opinion in *Gateway*. Otherwise he would have dissented for the reasons, among others, advanced by Judge Rosenn in the *Gateway* case.

the determination as to what constitutes a safety hazard."

Such a doctrine, if permitted to stand, is certain to cause chaos and unrest, not only in the coal industry, which is already plagued with more than its share of wildcat strikes,²² but in all other industries as well. It does not take much ingenuity for a union or its members to create a "safety" dispute as a pretext to justify a work stoppage for some other objective. If the union's assertion that a "safety hazard" exists must be accepted by the court, the sanctity of the arbitration provision and the no-strike pledge will be emasculated, and federal labor policy thereby subverted.

22. See Amicus Curiae Brief on the merits on behalf of Bituminous Coal Operators' Association, Inc., p. 9.

Argument.

V. In Any Event, The Court of Appeals Erred In Extending The Protection of Section 502 to Employees Not Physically Located At or Near the Alleged Abnormally Hazardous Condition for Work.

Quite apart from the foregoing, it is clear that the Court of Appeals stretched the scope of Section 502 far beyond its elastic limit.

Although the foremen alleged to constitute the "abnormally dangerous condition" worked in the mine on the third or midnight shift, the protection of Section 502 was extended to strikers who worked on the first and second shifts (the daylight and afternoon shifts, respectively), as well as to those who were employed on the surface rather than underground in the mine.

There is no justification for extending the protection of Section 502 to employees not physically located at or near the allegedly hazardous condition for work, and nothing in the language of this section or in the record of this case suggests that it should have been done here.

*Conclusion.***CONCLUSION**

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit should be reversed with instructions to affirm the order of the District Court granting a preliminary injunction and directing arbitration of the underlying dispute.

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May 12, 1973

*Appendix A.***APPENDIX A**

Section 8(f) (1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §657(f) (1)) provides:

"Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination."

*Appendix B.***APPENDIX B**

Section 103(g) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. §813(g)) provides:

"Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provision of this title."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-782
—

GATEWAY COAL COMPANY, *Petitioner,*

v.

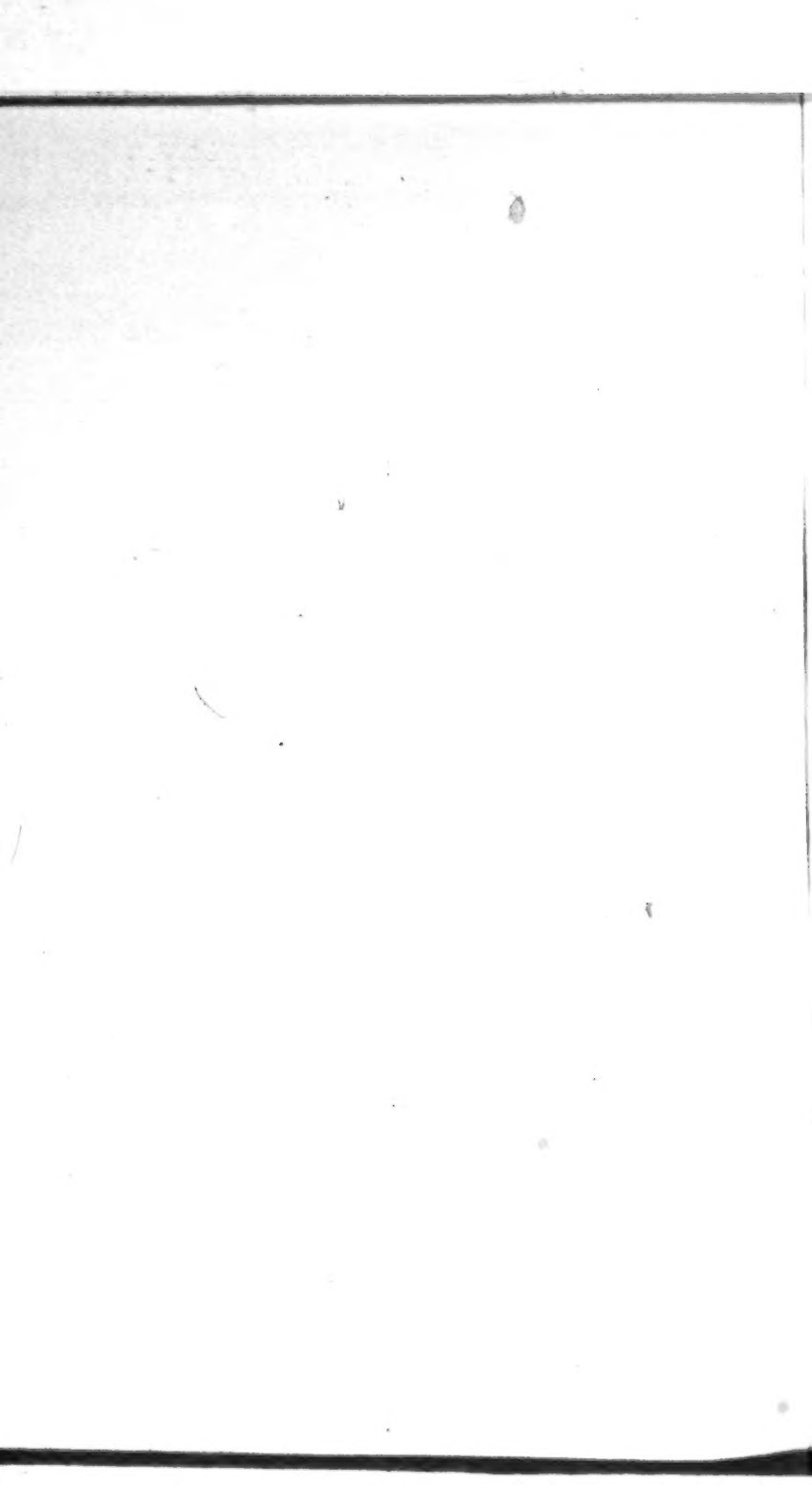
UNITED MINE WORKERS OF AMERICA; DISTRICT No. 4,
UNITED MINE WORKERS OF AMERICA; LOCAL No. 6330,
UNITED MINE WORKERS OF AMERICA, *Respondents.*

—
On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit
—

BRIEF OF THE BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC., AMICUS CURIAE
—

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BRIEF OF THE BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC., AMICUS CURIAE

The Bituminous Coal Operators' Association, Inc.,
herein called BCOA, respectfully files this brief *Amicus
Curiae* pursuant to leave granted by Order of the Court
dated February 26, 1973.

**INTEREST OF THE BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.**

The Bituminous Coal Operators' Association, Inc. is a voluntary nonprofit association of bituminous coal mine operators. It was born in 1950 out of an effort to bring a degree of stability out of the labor-management relations turmoil that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding BCOA members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA is also the chief coal industry spokesman on matters involving health and safety.

The members of BCOA are located throughout all the coal mining areas encompassing all of the coal-producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

Petitioner Gateway Coal Company is a member of BCOA and a signatory to the National Bituminous Coal Wage Agreement. The employees at the mine are members of a local union of the United Mine Workers of America.

BCOA, therefore, has a continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields.

The decision of the court below, if permitted to stand, will drastically weaken the efficacy of the contractual grievance-arbitration procedures and will ad-

versely affect the ability of the coal industry to maintain an adequate supply of coal. It impinges directly and disastrously on BCOA's two major concerns—the stability of employment and production under the agreement and the improvement of health and safety.

STATEMENT OF THE CASE

The Central Issue in the Case Is the Arbitrability of Safety Grievances.

This brief is addressed to the central issue in this case—the arbitrability of health and safety disputes.

Reversing the judgment of the District Court, the court below held that safety disputes are "*sui generis*" and not arbitrable even under an agreement containing an exceptionally broad grievance-arbitration provision.

By reason of its central ruling that safety disputes are by their very nature unarbitrable, the court below was led in syllogistic sequence to conclude that unions may strike at will over safety disputes and the courts, as well as arbitrators, are powerless to intervene or to resolve the disputed issues.

BCOA believes that these conclusions are clearly wrong as a matter of law, and that chaos is likely to prevail in the coal industry if this decision is allowed to stand. The coal industry is already plagued with an abnormally high incidence of wildcat strikes and the decision of the court below removes a wide range of local disputes over "safety" from the rule of law and relegates them to open warfare, which can only have the effect of seriously aggravating an already alarming lack of stability of employment and production in the coal industry.

Summary of Facts.

The wildcat strike at the Gateway Mine started, not over a safety issue, but over a claim by the local union for reporting pay under the labor agreement.

The target of the wildcatters soon shifted, however, to a demand that the Company discharge three foremen who had allegedly failed to make certain required log entries concerning a ventilation problem that had developed in the mine. The Company first suspended two of the three foremen and then the third pending an investigation by Pennsylvania State safety authorities.

When the State safety authorities found that the foremen could be returned to work without endangering the safety of the miners, two of them were reinstated and the third retired.

This action triggered another general walkout by the local union, although the two reinstated foremen were both employed on only one of the three regular working shifts, and could not have endangered safety on the other two shifts who also went out on strike.

The District Court Decision.

After attempting unsuccessfully to obtain union agreement for arbitration of the dispute, the Company applied for and obtained a temporary restraining order and, later, a preliminary injunction in the District Court. The District Court ordered the parties to arbitrate the question of whether the presence of the two foremen in the mine created any safety hazard, and enjoined the continuance of the strike. *However*, the District Court further ordered that, since the local union claimed that the presence of the foremen in

the mine created a safety hazard, they should "remain suspended until an impartial umpire has determined whether these men should return to work." *Gateway Coal Co. v. UMW*, — F. Supp. —, 80 LRRM 2633, 2634 (W.D. Pa. 1971).

The preliminary injunction was appealed to the Third Circuit Court.

The Arbitrator's Decision.

Meantime, the dispute was arbitrated, and before the appeal was heard and decided, the arbitrator issued his decision and award. He held that the dispute was arbitrable under the agreement, that the presence of the two foremen in the mine did not render it unsafe, and that the suspended foremen should be reinstated without interference by the local union.

The Court of Appeals Decision.

Meanwhile, the union had appealed the preliminary injunction to the Third Circuit Court.

The court below reversed the District Court and dissolved the preliminary injunction.

The court majority below held that the dispute was not arbitrable, and as a consequence *Boys Markets* did not apply and no injunction should have issued. The court reasoned that the labor agreement did not explicitly make "safety" disputes arbitrable, and because safety disputes are unique, should not be construed to encompass them. The majority expressly refused to pass on whether it would hold otherwise "in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitra-

tion . . ." *Gateway Coal Co. v. UMW*, 466 F. 2d 1157, 1160, fn. 1.

The court below stated its belief that the employees are the sole judge of the safety of the conditions under which they work:

"If employees believe the correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." 466 F. 2d at 1160.

The Dissenting Opinion.

Judge Rosenn dissented. He pointed out that there was a serious question whether the strike was because of a safety issue, since it started over the refusal of the Company to pay the men who went home on April 15.

Judge Rosenn held that the decision of the majority placed in the hands of an employee or group of employees the sole and unreviewable power to label another employee a working hazard and engage in a refusal to work and cause other employees unaffected by the issue to strike. He found that the majority decision ran "directly counter to our national labor policy of promoting labor stability" and opened "new and hazardous avenues in labor relations for unrest and strikes." 466 F. 2d at 1162.

Judge Rosenn further found that the majority had misapprehended § 502 of the Labor-Management Relations Act, stating his opinion that this provision does not oust arbitrators or courts from jurisdiction or prohibit courts from compelling arbitration of a safety

dispute. He pointed out that the District Court had in its order forbidden the foremen to return to work pending arbitration of the dispute. 466 F.2d at 1163. By thus conditioning the injunction, Judge Rosenn said, the national policy favoring arbitration could be carried out without endangering the safety of employees.

The order of the court below, Judge Rosenn pointed out, accomplished nothing. It merely restored the parties to the impasse which confronted them in June 1971, with no apparent means of resolution other than self-help.

The U. S. Steel Decision.

The Third Circuit has since applied its ruling in *Gateway* in another case arising under the 1968 National Bituminous Coal Wage Agreement involving a mine of United States Steel Corporation. In that case, the union struck the mine over an alleged failure of a shift foreman to "show the proper concern for mine safety."

The Third Circuit in a *per curiam* opinion set aside a preliminary injunction issued by the District Court. The three-judge panel interpreted the decision in *Gateway* to hold that the 1968 Agreement did not bar miners from striking over safety disputes, and that "it is the miners themselves who should make the determination as to what constitutes a safety hazard." *U. S. Steel v. UMW*, 469 F.2d 729 (3d Cir. 1972).

Significantly, while the *per curiam* opinion in the *U. S. Steel* case was joined in by three judges, Judge Layton indicated his disagreement with the *Gateway* opinion but felt bound by it.

ARGUMENT**A. The Decision of the Court Below Will Encourage Instability and Unrest in the Coal Industry.**

BCOA is deeply concerned that the decision of the court below will do incalculable harm to labor stability in the coal industry. Nor do we perceive any compensating benefits flowing from the decision to the union or the coal miners.

The decision of the court below carves out all safety disputes or grievances and labels them "*sui generis*," and *ergo*, nonarbitrable. The court below quite literally held that "safety" grievances are not subject to arbitration and that strikes labeled unilaterally by an employee, a group of employees or a union as "safety" strikes are not enjoined. The necessary effect of this ruling is to relegate all safety disputes to a no-man's land beyond the reach of arbitrators or courts. This ruling opens the door to self-help, rampant wildcat strikes, and chaos in the coal mining industry.

As dissenting Judge Rosenn so aptly said:

"If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies, and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." 466 F.2d at 1162.

The references by Judge Rosenn to "wildcatters," "unrest" and "strikes" is especially apt in the coal in-

dustry. The coal mining industry has the worst record by far of any major industry in frequency of wildcat strikes and production and wages lost due to wildcat strikes.

Incomplete reports received from BCOA members alone show the following losses to the mine operators and the miners due to wildcat strikes over a 4-year period.

Year	Man-Days Lost	Payroll Loss	Tonnage Loss	UMWA Welfare Fund Loss
1969	569,578	\$19,164,330	10,897,631	\$4,359,052
1970	593,146	21,459,349	11,388,572	4,555,429
1971	565,027	21,981,476	8,762,062	3,739,264
1972	511,177	21,783,128	8,372,091	5,023,250

It is quite literally true that such is the tradition of the union that on numerous occasions all or most of the coal mines in an entire UMWA District, or an entire coal-producing state or group of states, have been shut down by roving pickets over a single grievance at a single mine. This, in fact, happened in this very case. When the wildcat strike occurred at the Gateway mine, roving pickets shut down other mines in the area.

Nearly all of these grievances which lead to wildcat strikes are eventually arbitrated in any event under the agreement.¹ What is needed, therefore, is not the encouragement of greater resort to destructive self-help, but rather greater acceptability by the coal miners and their local unions of the available procedures for the peaceful, expeditious and just arbitration of grievance disputes.

¹ BCOA members alone arbitrated more than 500 grievances in 1972.

The most alarming aspect of the ruling of the court below is that it provides a ready-made excuse for avoiding arbitration and wildecating over any issue that may arise at the coal mines. As Judge Rosenn so clearly saw, all that an individual or group, pursuing his or their own selfish ends, need do is advance a specious grievance, label it a "safety" issue, mount a wildecat strike, and the dispute would be nonarbitrable and the courts and arbitrators would be powerless to act. It is difficult to see how such a rule could benefit the interests of the union or the miners.

Old habits are hard to break, and the wildecat strike in the coal industry has deep roots in the past. It will take the combined efforts of the employers, the union at all its levels, the employees and the arbitrators and courts to bring about a gradual acceptance by the miners of the amelioratory course of impartial arbitration. *Boys Markets*² teaches that, where there exists a contract and machinery for the final and binding resolution of grievances and disputes, a promise is implied on the part of the management, the union, and the employees that they will utilize those procedures rather than resort to self-help, the lockout or the strike. The lower courts have, in numerous decisions, held that *Boys Markets* applies to the National Bituminous Coal Wage Agreement, and certainly there is no industry in which the aid of the courts to encourage recourse to arbitration of disputes is more urgently needed.

The decision of the court below denies arbitration but offers no alternative to arbitration. It repeals the

² *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

*Steelworkers Trilogy*³ and *Boys Markets* for safety disputes and unleashes employees and unions and employers to take matters into their own hands, to strike, to lockout and to create economic havoc over any safety issue, real or imagined. But the decision below, as Judge Rosenn so aptly notes, offers no alternative means for the settlement or resolution of the underlying dispute either by arbitration or by court adjudication. This invitation to the law of the jungle in a critical area of labor-management relations—health and safety—is in open and direct contradiction to the national policy, expounded by this Court encouraging resort to impartial arbitration to resolve employee grievances and labor-management disputes.

B. The Decision of the Court Below Conflicts With Fundamental Principles of Labor Law and Policy Established by the Court.

The decision of the court below denying arbitration of “safety” disputes certainly cannot be defended on the ground that it was dictated by decisions of the Court.

The Court has made it clear time after time that nothing is more basic to the national labor policy than the principle of strongly favoring arbitration against stalemate and self-help in resolving labor-management disputes.

The decision of the court below conflicts directly with every facet of that policy, and, in a broad spectrum of disputes—those denominated as safety disputes—literally stands that policy on its head.

³ The three decisions on arbitration issued by the Court in 1960. *Infra*, p. 12.

The Steelworkers Trilogy.

In the three landmark cases decided by the Court in 1960, the Court created a strong presumption favoring arbitration of grievance disputes. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960). In effect, the Court held that where there exists an arbitration provision, all disputes are arbitrable unless specifically excluded from arbitration. As the Court stated in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960):

“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

Nothing could be more plain than that. The Court did not exclude the broad category of safety disputes from this rule.

But here, the court below applied the reverse presumption. The court below fashioned its own rule for safety disputes. The court held that safety disputes are “*sui generis*” and thus not subject to the strong federal policy favoring arbitration of “the ordinary types of labor disputes.” Therefore, in order for a safety dispute to be arbitrable, the court reasoned, the agreement must at the very least *explicitly* make safety disputes arbitrable.

The court then examined the exceptionally broad language of the 1968 National Bituminous Coal Wage

Agreement and found that the Agreement provided for arbitration of "local trouble of any kind" at the mine. Nevertheless, the court found that this did not suffice because:

"It is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." 466 F.2d at 1159.

Indeed, the court below hinted very strongly that it would not require arbitration of safety grievances even if the parties expressly so agreed.⁴

Obviously, no argument is needed to demonstrate that the court below has attempted to fashion a new rule for safety disputes which is in direct opposition to rule announced by this Court in the *Steelworkers Trilogy*.

The court below seeks to justify this totally different approach to arbitration by asserting that safety disputes are "*sui generis*" and that employees do not and should not have to submit matters affecting their safety to an arbitrator, no matter how impartial he may be.

But, as Judge Rosenn perceived, the argument is self-defeating. The decision of the court denying arbitration provides no other means for resolving the issues between the parties. Rather, it sanctions the indefinite continuation of a wildcat strike over a safety dispute

⁴ The decision of the court below conflicts broadly with the decision of the Eighth Circuit Court of Appeals in *Hanna Mining Co. v. Steelworkers*, 464 F. 2d 565 (8th Cir. 1972). The opinion in the *Hanna* case distinguishes the *Gateway* decision on the facts, but it is clear that the two court decisions are in basic conflict in principle.

but offers no hope of settlement of the dispute except through trial by combat. This is manifestly a sterile doctrine.

We submit that the court below is wrong in its belief that safety disputes do not lend themselves to resolution through arbitration.

Safety Disputes Are Susceptible to the Arbitration Process.

Arbitrators, like courts, are trained and conditioned to adjudicate a wide range of issues, including many that require an ability on the part of the arbitrator to comprehend technical fields such as health and safety. In this very case, the issue of whether the continued presence of two foremen in the mine created a safety hazard was certainly one that an experienced arbitrator could cope with, and the court below offers no cogent argument to the contrary.

In all human relationships, disputes arise which require resolution by judges or arbitrators for the plain and simple reason that where the parties are unable to resolve a dispute between or among themselves, another means of adjudication must be found. That is why we have courts and arbitrators, and we cannot carve out a large area of potential industrial issues, denominate them as "safety disputes" and remove them from the subjects which require third party adjudication. Experience teaches that if an honest difference arises, some means must eventually be found for a peaceful resolution. Here, the parties, through their industry-wide collective bargaining agreement, have chosen to give the broadest scope to arbitration, agreeing to arbitrate any grievance, any dispute, or "any local trouble of any kind." They entered into this procedure voluntarily and should now be obligated

to use it. The decision of the court below denies them that peaceful avenue and leaves them to their own devices.

Safety Disputes Are Being Arbitrated.

The court below was incorrect in its assumption that safety disputes have not been arbitrated under the National Bituminous Coal Wage Agreement. It may be that the local union and management at the Gateway Mine had not previously arbitrated a safety grievance, but the industry practice has been to arbitrate all kinds of disputes and grievances, and this includes, without distinction, safety grievances.

The union argues that the provision in the 1968 Agreement—which provides that the local Mine Safety Committee can declare that an “imminent danger” exists and have the miners withdrawn from allegedly dangerous areas—evidences an intent that safety disputes should not be arbitrated. This is patently a *non sequitur*. Once the Mine Safety Committee has acted and the miners are temporarily withdrawn, there still remains a potential dispute as to the existence of an imminent hazard, and this dispute will normally be resolved either by mutual agreement, or failing agreement, by arbitration.

Moreover, this same provision for a Mine Safety Committee, with the same authority in the Mine Safety Committee to declare that an imminent danger exists, is found in the 1971 Agreement (see Appendix 6a) and yet the 1971 Agreement contains some new and special provisions for arbitrating health and safety disputes.

In sum, on this issue of arbitrability of safety disputes under the successive National Coal Wage Agreements, including the 1968 Agreement, the practice has been to give the widest scope to grievance arbitration,

including arbitration of safety grievances. BCOA receives copies of arbitration awards involving BCOA members and BCOA's arbitration files show that at least forty safety disputes⁵ have been arbitrated in the past three years, and we know of no arbitrator who ever rejected a safety dispute as being nonarbitrable.

In the 1971 negotiations, in recognition of the growing concern of the union and industry with health and safety, the negotiators devised and put into the national agreement some specially designed procedures for handling health and safety disputes. But, long before that, these disputes were cognizable under the general grievance-arbitration provisions of the agreement. (The pertinent provisions of the 1968 and 1971 Agreements relating to grievance and arbitration are set forth in the Appendix to this brief.)

C. The Decision of the Court Below Conflicts Directly With the Uniform Interpretation of § 502 of the Labor-Management Relations Act.

To bolster its view that "safety" issues are by their very nature not arbitrable, the court below called upon its own unique interpretation of § 502 of the Labor-Management Relations Act. This Section provides that when employees in good faith quit work because of abnormally dangerous conditions, it shall not be deemed a "strike."

The purpose of this provision in the Act was to protect employees from discharge where they leave work in concert because of abnormally dangerous working conditions. Two elements must coincide before this provision comes into play. First, the concerted

⁵ The usual context in which a safety issue is arbitrated arises out of the refusal of an employee to perform a particular task on safety grounds and consequent disciplinary action taken by management against such employee.

abstention from work must be in good faith, and second, abnormally dangerous conditions must in fact exist. This has been the uniform interpretation of this provision by the National Labor Relations Board and the courts. Thus, the NLRB said in *Redwing Carriers*, 130 NLRB 1208, 1209 (1961), *enf'd. as modified*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905:

"It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective as opposed to a subjective test. What controls is not the state of mind of the employee or employees concerned, but whether the actual circumstances shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"⁶

In other words, the test is not a "good faith apprehension of physical danger" but rather by the use of "an objective, as opposed to a subjective, test" to determine whether "the actual working conditions shown to exist might in the circumstances reasonably be considered 'abnormally dangerous.'" The Courts of Appeals have adopted the *Redwing* test in construing § 502. See *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885, 892 (8th Cir. 1964); *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492, 495 (3d Cir. 1964), *cert. denied*, 379 U.S. 833; *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927.

The court below chose to give § 502 a wholly different interpretation, leaving it entirely to the subjective

⁶ This standard or construction of § 502 was most recently affirmed by the Board in *Anaconda Aluminum Co.*, 197 NLRB No. 51, 80 LRRM 1780 (1972).

judgment of any individual employee or group of employees, or the local union as to whether abnormal hazards exist. This interpretation runs counter to the stream of NLRB and judicial opinion.

In any event, as Judge Rosenn points out, a determination must still be made as to the conditions under which the employees shall return to work, what conditions are safe and what are not, and there is nothing in § 502 to suggest that these safety disputes are not proper subjects for impartial arbitration. As Judge Rosenn stated:

“Section 502 nowhere states or implies that safety issues are not appropriate for an arbitrator’s decision. In fact, as I view it, the section requires a third party, a court, to determine the reasonableness of the union’s belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision.” 466 F.2d at 1162.

CONCLUSION

We think it significant, in assessing the efficacy and fairness of encompassing safety within the area of arbitrability under the *Steelworkers Trilogy*, that no legitimate safety interest of the employees at the Gateway Mine was in any way endangered by the invocation of the *Boys Markets* injunction or by the District Court Order requiring that the dispute be arbitrated. The District Court conditioned the injunction on the continued suspension of the two foremen until the issue of whether their presence in the mine endangered

safety had been determined by the impartial arbitrator. Thus, by this process, the integrity of the arbitration process was upheld, the mine was kept in operation, the safety interests of the employees were protected, and the underlying "safety" issue was resolved by the arbitral process that the parties had, themselves, chosen.

All this was, of course, undone by the Court of Appeals decision.

The decision of the court below licenses wildcat strikes over real or contrived grievances and provides an easy loophole for evading the agreed-upon arbitration procedures. Mine operators faced with wildcat strikes over any issue denominated as a "safety" issue must either capitulate or risk an indefinite shutdown and eventual economic ruin. Miners wishing to arbitrate a safety issue will be foreclosed from that opportunity. Miners who perceive no danger and wish to continue to work will find themselves at the mercy of the wildcatters over any kind of specious health or safety dispute.

We must disagree with the unspoken premise of the court below that safety disputes are so different from all other disputes as not to be susceptible to reasoned impartial adjudication by arbitrators. The type of resolution to which the parties are left by the decision of the court below—by a test of economic strength between mine owner and wildcat strikers—is hardly calculated to provide a better, a more rational, or a more equitable decision or one that will better serve the cause of safety than the reasoned process of arbitration.

BCOA submits that the decision of the court below is a major retrogressive step which, if not reversed,

will create chaos and confusion throughout the coal fields. The proposition of law it expounds is unthinking and dangerous. Its adverse impact on labor relations in the coal fields is immediate and apparent. It does not serve the cause of improved safety, but rather invites recourse to economic warfare on a national scale in the coal industry.

Respectfully submitted,

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APPENDIX

Provisions in the 1968 National Bituminous Coal Wage Agreement for Settlement of Local and District Disputes

Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the mine committee.

3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an

umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

Article XVII. Provisions in the 1971 National Bituminous Coal Wage Agreement for Settlement of Disputes

Section (a) Mine Committee

A committee of three employees shall be elected at each mine by the employees at such mine. Each member of the mine committee shall be an employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this agreement that the mine management and the employee or employees have failed to adjust. The mine committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee. (1941)

Section (b) Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time. (The parties will not be represented by legal counsel at any of the steps below.):

(1) By the aggrieved party and his foreman who shall have authority to settle the complaint. Any grievance

which is not filed by the aggrieved party within fifteen calendar days after he reasonably should have known of such grievance shall be considered invalid and not subject to further prosecution under the grievance machinery.

(2) If no agreement is reached, the grievance shall be taken up by the mine committee and the mine management within five calendar days of the conclusion of step 1. A standard grievance form shall be completed and jointly signed by the parties to the grievance. Such a form will be agreed upon by the parties.

(3) If no agreement is reached, the grievance shall be taken up by the UMW district representative and a designated representative of the Employer within ten calendar days of the conclusion of step 2.

(4) If no agreement is reached, the grievance shall be taken up by the Board within ten calendar days of the conclusion of step 3 or in discharge cases within five calendar days of notice of appeal. The Board shall consist of four members, two of whom shall be designated by the Union and two by the Employer. Neither the Union's representatives on the Board nor the Employer's representatives on the Board shall be the same persons who participated in steps 1, 2, or 3 of this procedure.

(5) Should the Board fail to agree the matter shall, within ten calendar days after decision by the Board, be referred to an umpire who shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and fees incident to the services of an umpire shall be paid equally by the Employer or Employers affected and by the Union.

The grievant shall have the right to be present at each step, if he so desires, of the foregoing procedures until such time as all evidence is taken. A decision reached at any stage prior to step 5 of the proceedings above outlined

shall be reduced to writing and signed by both parties. The decision shall be binding on both parties and shall not be subject to reopening except by mutual agreement.

*Section (c) Joint Committee on
Arbitration Procedure*

A committee of equal representation from the Employers and the Union will be appointed immediately after the execution of this agreement to study the feasibility of a permanent or chief umpire and/or a panel of umpires to arbitrate disputes which may arise under the terms of the agreement.

The committee will examine methods of selection, tenure, compensation and related matters and will complete its report and recommendations no later than April 1, 1972.

**Article III. Provisions in the 1971 National Bituminous Coal
Wage Agreement for Health and Safety**

*Section (a) Federal Mine Health
and Safety Act of 1969*

The parties to this contract, finding themselves in complete accord with the FINDINGS AND PURPOSE declared by the United States Congress in section 2 of the Federal Coal Mine Health and Safety Act of 1969 do hereby affirm and subscribe to the principles as set forth in such section of the act.

(1) In consequence of this affirmation the parties not only accept their several responsibilities, obligations, and duties imposed by the Federal Coal Mine Health and Safety Act, but freely resolve to cooperate among each other and with the responsible officials of federal and state governments in determined efforts to achieve greatly improved performance in coal mine health and safety.

(2) Neither party waives or repudiates any administrative, procedural, legislative, or judicial rights under or relating to the Federal Coal Mine Health and Safety Act of 1969.

Section (b) Mine Safety Code

The Federal Mine Safety Code for Bituminous Coal and Lignite Mines of the United States, Part I—underground mines, and Part II—strip mines, promulgated and approved October 8, 1953 by the Secretary of the Interior is hereby adopted and incorporated by reference in this contract as an additional code for health and safety in bituminous and lignite mines of the parties of the first part. Provided, however, if such provisions of the October 8, 1953 Code as they exist on October 1, 1971 or during the period of this agreement become superseded, nullified or rendered void as a consequence of any provision of the act, they are no longer in effect as Code provisions.

Section (c) Code Enforcement

(1) Reports of the federal coal mine inspectors: Whenever inspectors of the United States Bureau of Mines, in making their inspections in accordance with authority as provided in the Federal Coal Mine Health and Safety Act of 1969 find there are violations of the Federal Mine Safety Code and make recommendations for the elimination of such noncompliance, the operators shall promptly comply with such recommendations, except as modified in subsection (2) of this section.

(2) Whenever either party to the contract feels that compliance with the recommendations of the federal mine inspectors as provided in subsection (c)(1) hereof would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Industry Health and Safety Committee as provided in section (e).

Section (d) Review and Revision

In order to carry out the intent and purposes of the agreement as expressed in section (a) hereof, it is agreed that duly designated representatives of the Union and the Employers shall seek joint consultations with the United States Bureau of Mines and/or designated representatives

of the Secretary of Health, Education, and Welfare looking toward review and appropriate development and revision of improved mandatory health and safety standards as provided in section 101 of the act. They may seek such joint consultations with the United States Bureau of Mines for discussion of the technical aspects of petitions by the Employer or the Union as provided in section 301(c) of the act.

*Section (e) Joint Industry Health
and Safety Committee*

There is hereby established under this agreement a Joint Industry Health and Safety Committee composed of six members, three of whom will be appointed by the Union with one of the three having special knowledge and expertise in coal mine health matters, and three of whom will be appointed by the Employers with one of the three having special knowledge and expertise in coal mine health matters. The duties of this committee shall be to: (1) arbitrate any appeal which is filed with it by any Employer or any employee who feels that any reported violations of the Code and recommendation of compliance by a federal coal mine inspector pursuant to subsection (c)(1) herein has not been justly reported or that the action required of him to correct the violation would subject him to irreparable damage or great injustice; (2) consult with the United States Bureau of Mines and/or representatives of the Secretary of Health, Education, and Welfare in accordance with the provisions of section (d) hereof; and (3) function as prescribed in subsection (h)(4) hereof.

Section (f) Mine Health and Safety Committee

At each mine there shall be a mine health and safety committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union. The local union shall inform the Em-

ployer the names of the committee members. The committee members while engaged in the performance of their duties, with the following exception, shall be paid by the local union: When the mine health and safety committee is making or participating in an investigation of an explosion and/or a disaster including any mine fatality, they shall be paid by the Employer at their regular rate of pay (including any applicable premium rates) for the hours spent making or participating in such investigation, provided there is not a more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the applicable workmen's compensation law.

*Section (g) Mine Health and Safety
Committee Inspections*

(1) The mine health and safety committee may inspect any portion of a mine and surface installations connected therewith. If the committee believes conditions found endanger the lives and bodies of the employees, it shall report its findings and recommendations to the Employer. In those special instances where the committee believes an imminent danger exists and the committee recommends that the Employer remove all employees from the involved area, the Employer is required to follow the recommendations of the committee.

(2) While making inspections, the mine health and safety committee shall be accompanied by a representative of the Employer.

(3) If the mine health and safety committee in closing down an area of the mine acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievance that may arise as a result of a request for removal of a member of the health and safety committee under this section shall be handled in accordance

with the provisions of article XVII entitled "Settlement of Disputes."

(4) The mine health and safety committee and the Employer shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the agreement as may be required, and copies of all reports made by the mine health and safety committee shall be filed with the Employer.

*Section (h) Settlement of Health
or Safety Disputes*

When a dispute arises at the mine involving health or safety, an immediate, earnest and sincere effort shall be made to resolve the matter through the following steps:

- (1) By the mine management and the mine health and safety committee.
- (2) By the United Mine Workers of America district safety coordinator or an alternate designated by the United Mine Workers of America Safety Director and a representative designated by the Employer. Failing to resolve the issue, they shall immediately call in for consultation a representative of the United States Bureau of Mines and/or the appropriate state agency in a further attempt to resolve the issue.
- (3) By the United Mine Workers of America Safety Director or his representative and a representative designated by the Employer.
- (4) By the Joint Industry Health and Safety Committee which for the purposes of this step shall employ a special structure and procedures as set forth below:
 - (A) The six regular committee members shall select a neutral chairman having special

knowledge in matters of coal mine health and/or safety. The selection must be made immediately following referral of a dispute. The regular committee shall adopt procedures that will insure such timely selection.

- (B) The neutral chairman and either four or six regular members equally representing the United Mine Workers of America and the Employers shall constitute a quorum. When a dispute involves health issues, two of the regular members must be those designated in section (e) hereof who have special knowledge and expertise in coal mine health matters.
- (C) Decisions shall be reached not later than five days following referral to the committee. Such decisions shall be by majority vote and shall be binding upon the parties involved in the dispute.
- (D) Costs of the neutral chairman shall be borne equally by the parties.

Section (i) Safety Rules and Regulations

Reasonable rules and regulations of the Employer, not inconsistent with federal and state laws, for the protection of the persons of the employees and the preservation of property shall be complied with. (1941)

Section (j) Physical Examination

Physical examination, required as a condition of or in employment, shall not be used other than to determine the physical condition or to contribute to the health and well-being of the employee or employees. The retention or dis-

placement of employees because of physical conditions shall not be used for the purpose of effecting discrimination. (1941)

Section (k) Engineer and Pumper Duties

When required by the Employer, engineers, pumpers, firemen, power plant and substation attendants shall under no conditions suspend work but shall at all times protect all the Employer's property under their care, and operate fans and pumps and lower and hoist persons or supplies as may be required to protect the Employer's coal mine and other related facilities. (1941)

Section (l) Minimum Age

No person under 18 years of age shall be employed inside any mine nor in hazardous occupations outside any mine; provided, however, that where a state law provides a higher minimum age, the state law shall govern. (1941)

*Section (m) Safety Equipment and
Protective Clothing Allowance*

Safety equipment and devices, including electric cap lamps, shall be furnished by the Employer without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. (1946) In lieu of supplying such personal wearing apparel, the Employer shall pay each employee an annual protective clothing allowance. The protective clothing allowance will be \$10 effective November 12, 1972 and \$20 effective November 12, 1973. The allowance will be paid to each employee with the first payment of wages to which he is entitled following the effective date of the allowance.

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*Section (n) Workmen's Compensation
and Occupational Disease*

Each Employer who is a party to this agreement will provide the protection and coverage of the benefits under workmen's compensation and occupational disease laws, whether compulsory or elective, existing in the states in which the respective employees are employed. Refusal of any Employer to carry out this direction shall be deemed a violation of this agreement. Notice of compliance with this section shall be posted at the mine.

MAY 15 1973

SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-782

GATEWAY COAL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA**

and

**BRIEF AMICUS CURIAE ON BEHALF OF THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-782

GATEWAY COAL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA**

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae*.¹ In support of this motion, the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States. The Chamber previously was granted leave by the Court to submit a brief *amicus curiae* in support of the petition for writ of certiorari.

1. Pursuant to Rule 42 of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner gave such consent, but counsel for Respondents declined to do so.

2. This case presents the question of whether a grievance, because it is not expressly provided for in the broad arbitration clause of a collective bargaining agreement, may be found non-arbitrable and thereby bar the injunction of a strike in violation of a contractual no-strike agreement. Prior to the decision in this case, it had been assumed that, "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the *most forceful evidence* of a purpose to exclude the claim from arbitration can prevail." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-5 (1960) (emphasis added). A strike "over a grievance which both parties are contractually bound to arbitrate", moreover, was enjoinable. *Boys Markets v. Retail Clerks Union*, 398 U. S. 235, 254 (1970). The opinion below, however, has seriously eroded these principles. It has created a major area where economic warfare, rather than arbitration, is to be the means of dispute resolution. A strike over *any* matter the parties have agreed is arbitrable should be subject to injunctive relief under *Boys Markets*. There should be no exceptions; no "sui generis" situations. The contrary view taken by the Court of Appeals in the instant case, as well as that recently enunciated by the Fifth Circuit in *Amstar Corporation v. Amalgamated Meat Cutters*, 468 F. 2d 1372 (1972), is, therefore, wrong. It should be corrected by this Court.

3. The other issue here presented—whether a concerted refusal to work because of a subjective apprehension of danger, absent objective supporting evidence, is protected under Section 502 of the National Labor Relations Act (29 U. S. C. § 143)—is also a matter of far-reaching importance. Prior to the decision below, the "controlling factor" in determining the applicability of Section 502 to work stoppages was "not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered abnormally dangerous." *Redwing Carriers*, 130 NLRB 1208, 1209 (1961).

The court below, however, would establish, as Judge Rosenn noted in his dissent (Pet. for Cert., App. C, p. 22a), a "new test . . . that '[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .,' they need not arbitrate." This novel approach, occurring in an area of numerous disputes, fails to harmonize the Act with other federal and state legislation specifically designed to deal with occupational health and safety. It, therefore, also requires reversal by this Court.

For the foregoing reasons, the Chamber respectfully requests leave to present its views.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**BRIEF AMICUS CURIAE ON BEHALF OF THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA**

This brief *amicus curiae* on behalf of The Chamber of Commerce of the United States of America is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae*.

ARGUMENT

I

**The Decision Below Conflicts with the Arbitration Principles
Established by This Court**

1. This Court has repeatedly "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and [has] cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union*, 398 U. S. 235, 243 (1970). Accordingly, "an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583, 584 (1960) (emphasis added). See also *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95, 105 (1962), where, even in the absence of an explicit contractual provision, this Court implied an agreement not to strike on the basis that a "contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitution for economic warfare"; *International Union of Operating Engineers, Local 150 v. Flair Builders*, U. S., 32 L. Ed. 2d 248, 252 (1972), where this Court held that, in a situation involving an agreement to arbitrate "any difference", the parties were bound to arbitrate even a claim that particular grievances were barred by laches; and *Avco Corp. v. Local Union No. 787, U. A. W.*, 459 F. 2d 968, 973 (7th Cir. 1972). The controlling principle, in short, has been that unless arbitration of a grievance is specifically precluded by the parties, the dispute is arbitrable. There have been no exceptions; no "sui generis" situations.

The court below disregarded these precepts. Notwithstanding the absence of an express exclusion, the decision below

created its own exception to the parties' all-inclusive arbitration agreement.¹ The court thus took a diametrically opposite view from the Trilogy² and other decisions noted above. It placed the burden on the party seeking arbitration to show that it was either "particularly stated [or] unambiguously agreed" that the dispute would be arbitrable—indeed, "safety disputes", however that term may be construed, are to be presumed *not* arbitrable. Pet. for Cert., App. C, pp. 16a, 18a. The result is a gaping loophole in the national labor policy of promoting arbitrability; few contracts are so far-sighted as to expressly provide for the arbitration of "safety disputes" or other particular classes of grievances.³ A collective bargaining agreement, after all, is

1. The contract in this case contains an arbitration provision providing that "all disputes and claims which are not settled by agreement shall be settled by arbitration" (Pet. for Cert., App. C., p. 6a), a clause virtually identical to that involved in *Boys Markets*. See 398 U. S. at 237, n. 1. It is immaterial that, following the commencement of this litigation, this provision was modified so as to provide a special arbitration procedure for the resolution of health and safety disputes. The contract involved in the instant case presents the typical situation (see n. 3, *supra*) and, accordingly, appropriately raises the important questions here at issue.

2. *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*; *United Steelworkers of America v. Enterprise Corp.*, 363 U. S. 593 (1960). These decisions, commonly referred to as the Trilogy, emphasized that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes under the agreement." 363 U. S. at 567 (emphasis added).

3. "About 94% of contracts provide for arbitration of grievances not settled by the parties themselves." 51 *Collective Bargaining—Negotiations and Contracts*, p. 6 (Washington, D. C.: BNA, Inc. 1970). Of these contracts, only 38% contain any limitation upon the scope of arbitration. Restriction of safety dispute arbitration, the issue involved in this case, is so minimal that the Bureau of National Affairs in the above study did not even list safety disputes as one of the "prevalent exclusions" from arbitration. Further, in the most recent study prepared for the Bureau of Labor Statistics of the Department of Labor, only "about 5% of the grievance provisions, covering 9% of the workers, . . . listed one or more specific issues that were excluded from the grievance process." None of these issues related to safety disputes. See Solby & Cunningham, *Grievance Procedures in Major Contracts*, BLS Bulletin 1425-1 (Department of Labor, Bureau of Labor Statistics, 1965).

only a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Warrior & Gulf*, 363 U. S. at 579. A strike over any matter, therefore, should be subject to injunctive relief under *Boys Markets*. The contrary view taken by the Court of Appeals in the instant case, as well as that recently enunciated by the Fifth Circuit in *Amstar Corporation v. Amalgamated Meat Cutters*, 468 F. 2d 1372 (1972), is wrong. It should be corrected by this Court.

2. The Trilogy also admonished that "it is the arbitrator's construction which was bargained for; . . . and the courts have no business overruling him because their interpretation of a contract is different from his." *Enterprise Corp.*, 363 U. S. at 599.⁴ The decision below, however, squarely conflicts with a well-reasoned decision of an arbitrator finding that the instant dispute was arbitrable and that there was no safety hazard. Pet. for Cert., App. C, pp. 44a-51a. This decision, clearly rendered within the arbitrator's authority and in accord with the parties' agreement, was "final and binding upon the parties." *Humphrey v. Moore*, 375 U. S. 335, 351 (1964). The Court of Appeals, however, in lieu of this determination as well as similar judgments by the District Court and the Pennsylvania Department of Environmental Resources, substituted its own view as to the resolution of the parties' dispute. In effect, it rewrote the parties' agreement to provide an exception to the

4. In *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1933, 1934 (1971), the National Labor Relations Board recently recognized that disputes arising under a labor agreement "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." Accordingly, the Board held that it will defer, in certain circumstances, "to the arbitration clause conceived by the parties." 77 LRRM at 1936. See also *Ries v. Reynolds Metal Co.*, . . . F. 2d . . . , 5 FEP Cases 1 (5th Cir. Sept. 20, 1972), which enunciated a similar policy of deferral under Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000-e, *et seq.*), an issue which is now before this Court. *Alexander v. Gardner-Denver Corp.*, No. 72-5847, cert. granted February 20, 1973.

contractual arbitration provisions. The Court had no such power. *H. K. Porter Co. v. N. L. R. B.*, 397 U. S. 99 (1970).

3. In *Boys Markets*, this Court did not differentiate, as does the court below (Pet. for Cert., App. C, p. 18a, n. 1), between economic and safety disputes. There is no authority for such a distinction;⁵ indeed, the objective of *Boys Markets* to promote the "expeditious settlement of industrial disputes without resort to strikes, lock-outs, or other self-help measures" (398 U. S. at 249) would be seriously vitiated by exempting safety disputes from the equitable relief provided for therein. Grievances involving disputes arising out of allegedly dangerous working conditions frequently occur, and are frequently arbitrated.⁶ The Court

5. See, e.g., *Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union*, 447 F. 2d 945 (7th Cir. 1971), holding, in a virtually identical situation to that here at issue, that a district court had jurisdiction, following *Boys Markets*, to grant equitable relief; and *Hanna Mining Co. v. Steelworkers*, 464 F. 2d 565 (8th Cir. 1972), similarly upholding an injunction of picketing, in violation of a contractual no-strike agreement, over an alleged safety hazard. Although *Hanna* attempted to distinguish the present case on the ground that the agreement there specifically required that safety disputes be submitted to arbitration, this is a tenuous distinction. As previously shown, the instant agreement, by not specifically excluding safety disputes, must also be construed so as to permit their arbitrability. Moreover, the thrust of the decision below—and where it materially differs from *Hanna*—is the Third Circuit's erroneous view that, since safety disputes are "sui generis", even if the contract here had specifically required the arbitration of such disputes, injunctive relief would still have been denied.

6. See, e.g., *United States Steel Corp.*, 51 L. A. 571 (1968), and *Carmet Corp.*, 52 L. A. 790 (1969). The Bureau of National Affairs, Labor Arbitration Series, in fact, has published, since 1963, more than 50 awards dealing with safety disputes. Commerce Clearing House's Labor Arbitration Award Series has similarly published, subsequent to 1961, more than 100 awards on the same subject. Many, if not the majority, of these awards concern the issue of whether, under a particular contract, employees may engage in a work stoppage when exposed to allegedly dangerous working conditions, the very issue in this case. See Labor Arbitration, Cumulative Index and Digest, BNA Nos. 118,658 and 124,70; Labor Arbitration Awards, Commerce Clearing House, Topical Index Digest, Topic: Safety; and the cases noted in the Chamber's motion for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari, n. 2.

of Appeals' approach undermines this sound industrial relations practice. It fosters the very dangers which *Boys Markets* sought to preclude: "aggravate[d] industrial strife . . . [a] delay [in the] . . . early resolution of the difficulties between employer and union . . . [and denial of] the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy." 398 U. S. at 248 and n. 17.

II.

The Decision Below Erred in Its Interpretation of Section 502 of the National Labor Relations Act, 29 U. S. C. § 143

1. The National Labor Relations Board and every court which has heretofore considered the application of Section 502 of the National Labor Relations Act, 29 U. S. C. § 143, to a work stoppage over alleged "abnormally dangerous working conditions" interpreted that "term [to] contemplate . . . an objective as opposed to a subjective test." *Redwing Carriers*, 130 NLRB 1208, 1209 (1961). The controlling consideration has not been "the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Stop & Shop, Inc.*, 161 NLRB 75, 76, n. 3 (1966).⁷ The "entire thrust" of the decision below, however, is different; in the Court of Appeals' opinion it is the employees "themselves who should make the determination as to what constitutes a safety hazard." *United States Steel Corp. v. United Mine Workers*, 469 F. 2d 729 (3rd Cir. 1972).

The decision below thus construes Section 502 as involving a subjective employee assessment, rather than an objective third

7. See also *Curtis Mathes Manufacturing Company*, 145 NLRB 473 (1963); *Fruin-Colnon Company*, 135 NLRB 737 (1962), *enf'd*, 303 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964); *N. L. R. B. v. Knight Morely Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. den.* 357 U. S. 927 (1958); *Philadelphia Marine Trade Association*, 138 NLRB 737, *enf'd*, 330 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964).

party decision, as to what constitutes a dangerous working condition. This reliance on the shifting "attitudes, fancies and whims" of employees "runs directly counter", as Judge Rosenn noted in his dissent, "to our national labor policy of promoting labor stability," and permits the subversion of any no-strike agreement merely by the "naked assertion" of an employee that a particular working condition "constitutes a safety hazard." Pet. for Cert., App. C, p. 22a. Arbitrators, notwithstanding their unique expertise and central role in industrial self-government (*Warrior & Gulf*, 363 U. S. at 581-2), have been relegated to an inferior, if not non-existent, role. This approach, as *Boys Markets* concluded with respect to a similar effort to undercut arbitration, manifestly "casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations . . . [and] does not make a viable contribution to federal labor policy." 398 U. S. at 249.

2. The approach of the court below is particularly anachronistic in light of the substantial state and federal legislation that has been recently enacted governing industrial safety. There is now a comprehensive statute, the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.*, which requires safe working conditions for virtually every employee, not covered by other federal safety regulations, in the Nation.⁸ There

8. That Act specifically covers the "abnormally dangerous" situation which Respondents assert to have been present here. Federal district courts are empowered, at the petition of the Secretary of Labor, to restrain any conditions or practices where "a danger exists which could reasonably be expected to cause death or serious physical harm." 29 U. S. C. § 662(a). In addition, if the Secretary of Labor arbitrarily fails to seek such relief, an endangered employee can compel such an action by writ of mandamus. 29 U. S. C. § 662(d). Thus, employees covered under the Act are assured that the Secretary will "act immediately to shut down the entire operation or that portion of it that threatens death or serious physical harm." Spann, *The New Occupational Safety and Health Act*, 58 A. B. A. J. 255 (1972). Significantly, the applicable standard is the objective criteria rejected here by the Court of Appeals; 29 U. S. C. § 662(b) specifically provides that the restraint proceedings shall be governed by Rule 65, F. R. C. P., which re-

is also, in the circumstances of this case, the federal Coal Mine Health and Safety Act, 30 U. S. C. § 801 *et seq.*, termed by President Nixon "the most significant piece of legislation ever developed with respect to coal mining in the United States",⁹ and extensive state coal mine safety legislation.¹⁰ And employees who engage in a concerted action to protest a dangerous working condition are protected against employer retaliation by the National Labor Relations Act.¹¹ Today, therefore, regardless of the situation that may have previously existed, a strike is not the only means whereby employees may express their understandable concern about safety. There are immediately available, quires, where possible, a hearing to show the specific facts which gave rise to the alleged irreparable injury.

9. Schmidt, *Selected Important Features and Background of the New Federal Coal Mine Health and Safety Act of 1969*, 3 Natural Resources Lawyer 241 (1970). See also Snow and Wheeler, *Proposals for Administrative Action under the Federal Coal Mine, Health and Safety Act of 1969*, 3 Natural Resources Lawyer 248, 264 (1970) ("A significant and far reaching attempt to improve health and safety conditions in the coal mining industries"). The Act, in addition to providing safety standards for underground mines, 30 U. S. C. § 811, and enforcement of those standards, 30 U. S. C. § 813, also affords, 30 U. S. C. § 814(a), specific injunctive protection for miners against the situation here present, alleged "imminent dangers". Again, however, the statute employs an objective, third-party test; only after a representative of the Secretary of the Interior finds that an "imminent danger" exists is an order issued requiring that all persons be withdrawn immediately from the endangered area and prohibited from entry until the Secretary determines the danger no longer exists.

10. See, e.g., The Bituminous Coal Mine Act, Pa. Stat. Ann., Title 52, § 70-101, *et seq.*, which allows (§ 70-120-1) inspectors, upon discovery of conditions which jeopardize life or health, to order miners to cease work at once or obtain a prompt investigation, as to the inspector's findings, by a commission. The criteria again is an objective, third-party evaluation. Pennsylvania, it should be noted, "has provided the best standards for mine safety in the nation" and has "the lowest injury rate in both fatal and non-fatal accident categories" of any of the four leading coal-producing states. Comment, *The 1969 Coal Mine Health and Safety Act: A Survey of Mine Safety Legislation in Pennsylvania*, 31 U. Pitt. L. Rev. 665, 669, 673 (1970).

11. See, e.g., *N. L. R. B. v. Washington Aluminum Co.*, 370 U. S. 9 (1962).

easily accessible and far more effective alternatives. Encouraging resort to these alternatives, in contrast to the decision below, would also achieve a desirable accommodation between federal labor and safety legislation.

CONCLUSION

For all the foregoing reasons, as well as for the reasons set forth by the Petitioner, it is respectfully urged that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS,
AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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v.

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DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

**MOTION OF THE NATIONAL ASSOCIATION OF MANU-
FACTURERS FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The

consent of the Attorney for the Respondents was requested but no reply was received.

The National Association of Manufacturers (NAM) is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members have collective bargaining agreements with labor organizations and may, therefore, be directly affected by the decision in this case.

In the day-to-day labor-management relations of industrial concerns, grievances often arise which involve some aspect of safety. This case is of particular interest to the members of the NAM because a fundamental, far reaching issue is presented involving the authority of a court to order arbitration and enjoin a strike when there is a labor dispute over a matter related to safety. The Third Circuit based its decision on an interpretation of Section 502 of the Labor Management Relations Act which is in conflict with the interpretation of other circuits and of the National Labor Relations Board. The decision is repugnant to federal labor policy favoring arbitration and it will adversely effect the stability of labor-management relations. It is, therefore, of vital importance to have Section 502 interpreted so that both employers and employee will understand their rights and obligations in such circumstances.

Accordingly, the NAM has an interest in the proper resolution of the issues before the Court in this case and urges that leave be granted to file the accompany-

ing brief as *amicus curiae* and respectfully so moves
this Court.

Respectfully submitted,

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PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers (NAM), in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

1. Federal Labor Policy Favors Arbitration.

The federal policy favoring voluntary settlement of labor disputes through the arbitral processes finds specific expression in Section 203(d) of the Labor Management Relations Act, in which Congress declared:

“Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.”

The National Labor Relations Board (NLRB) has followed a policy of encouraging and accepting arbitration awards. In *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955) the Board stated:

“In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor dispute will best be served by our recognition of the arbitrators' award.”

In *Collyer Insulated Wire*, 192 NLRB No. 150 (1971), the Board added a new dimension to its policy regarding arbitration. It held that if the alleged unfair labor practice involved an interpretation of the collective bargaining agreement between the parties and it was subject to the grievance/arbitration provisions of that contract, then the Board would defer to the contractual procedure.

Actions for breach of a collective bargaining agreement may be brought under Section 301 of the Labor-Management Relations Act. In the past when Section

301 has been considered by this Court, the federal policy favoring arbitration has been affirmed. In *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 582-83 and 584-85 (1960), this Court said:

"An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

* * * * *

"In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

More recently in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 252 (1970), this Court suggested that arbitration has become "the central institution in the administration of collective bargaining contracts."

In view of this history, a decision which permits circumvention of the arbitral process must be suspect.

2. The Dispute in the Present Case is Covered by the Arbitration Provisions of the Contract Between the Parties.

The collective bargaining agreement between the parties contained detailed procedures for settling local disputes and other procedures for disputes which are national in character. Specifically, the contract provided: "Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically

mentioned in this agreement, or should any local trouble of any kind arise at the mine, . . ." it will be resolved through a five-step procedure ending in arbitration (Petitioner's App. 13a). The contract later provides that disputes which are not settled through the above procedure because they are "national in character," are to be resolved by "free collective bargaining as heretofore practiced in the industry." (Petitioner's App. 15a). There is no claim that the present dispute is "national in character."

It would be difficult to conceive of a broader or more inclusive arbitration clause than the one contained in the above cited contract. Although the contract between the parties does not contain an express no-strike clause, such a clause may be implied where grievances are subject to final and binding arbitration. As this Court reasoned in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company*, 369 U.S. 95, 105 (1962): ". . . a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." It is submitted that in the circumstances of this case the strike should have been enjoined under this Court's reasoning in *Boys Markets, Inc. v. Retail Clerks Union*, *supra*.

3 The Decision of the Third Circuit Permits Circumvention of Federal Labor Policy Favoring Arbitration Where the Dispute Concerns a Safety Matter.

The crux of the decision of the Court of Appeals for the Third Circuit is that if employees believe in good faith that "abnormally dangerous" working conditions exist, they may strike during the term of their collec-

tive bargaining agreement regardless of the contractual provisions or whether objective evidence shows that the conditions are in fact unsafe. It concluded that a dispute involving a matter of safety is not subject to arbitration because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." (Petitioner's App. C, p. 16a in his Petition for Cert.). The Court's statement assumes that a matter is not arbitrable unless it is specifically stated in the contract. That assumption is contrary to the pronouncement of this Court in *Warrior & Gulf, supra*. Furthermore, the fact that the parties have been able to resolve past safety disputes without recourse to arbitration or strikes does not warrant the conclusion that the arbitration provisions of the contract are not applicable.

The lower court realized that its decision was grafting an exception onto the established rule and, after paying lip service to a "strong federal policy in favor of arbitration" stated: "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here If employees believe the correctable circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." (Petitioner's App. C, p. 17a in his Petition for Cert.). The court did not cite any judicial decisions for this aspect of its holding. Instead, it cited Section 502 of the Labor Management Relations Act, which provides: ". . . nor shall the quitting of labor by an employee or employees in good faith because of

abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." The court concluded that the employees were protected by a mere "good faith" assertion that conditions were unsafe regardless of whether in fact they were. That is the first time, so far as we have been able to ascertain, that the application of Section 502 has been held to turn solely on the good faith belief of employees when there was a lack of objective evidence to support the claim of the employees. Since only a subjective test—the "good faith" belief of the employees—is used, the decision of the court disregards objective criteria. This permits circumvention of federal labor policy favoring arbitration by the naked allegation that conditions are "abnormally dangerous."

4. The Interpretation of Section 502 by the Lower Court is Contrary to Established Legal Precedent.

The National Labor Relations Board and two Courts of Appeals have interpreted Section 502 differently from the Third Circuit. A clear statement by the NLRB on the meaning of Section 502 was made in *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961) when it said:

"It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.' "

The Board has consistently used that test in subsequent cases where Section 502 has been raised to justify violation of a no-strike clause. The interpretation of the Board should be accorded special weight. This Court has recognized the special expertise of the Board in balancing the conflicting interests of employers and employees. In *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96 (1957) this Court reviewed a decision of the Board which involved the question of whether members of an employer association committed an unfair labor practice by locking out employees. This court stated: "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

Again, in *NLRB v. Erie Resistor Corporation*, 373 U.S. 221, 236 (1963), this Court considered the Board's analysis in finding that the granting of super-seniority to non-striking employees was an unfair labor practice. In upholding the decision of the Board, this Court said: "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.'"

The question now before the Court requires a balancing of the interest of employees in not being required to work under abnormally dangerous conditions and the right of the employers to expect employees to honor

their no-strike commitment. It is submitted that this Court should give great weight to the Board's interpretation of Section 502. It is significant that two Courts of Appeals have agreed with the NLRB and held that competent objective evidence was necessary to apply Section 502. *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964) ; *NLRB v. Knight Morely Corp.*, 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958) reh. denied 358 U.S. 858 (1958). The present case is the first instance which rejects the requirement that an objective standard be used in determining whether abnormally dangerous conditions exist.

5. The New Construction of Section 502 Will be a Disruptive Influence on all Labor-Management Relations.

With the new construction placed on Section 502 by the court below, requiring only a good faith belief by the employees involved to bring them under the protection of Section 502, that Section becomes of major significance in all labor relations. It can be used to undermine a no-strike clause and defeat the grievance/arbitration procedures established by the contract. The decision of the lower court is not merely an erroneous interpretation of some little used section of the Act, rather, the decision introduces a new factor into labor-management relations. As pointed out by Circuit Judge Rosenn in his dissenting opinion:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbi-

tration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." *Gateway Coal Company v. United Mine Workers*, 466 F.2d 1157, 1162 (3rd Cir. 1972), Petitioner's App. C, p. 22a in his Petition for Cert.

The practical effect of the decision is to encourage employees who want to strike during the term of a contract, but are bound by a no-strike clause, to discover some safety grievance to use as a pretext for a strike. The present case presents just such an example: There was substantially more fresh air entering the mine, even with the obstruction, than was required by either state or federal law, (R. 9-10 of Appellant's App.). After the normal flow of air was restored, there was clearly no physical danger to miners, but they refused to work claiming that as long as the two negligent supervisors were responsible for safety procedures, the miners' lives were jeopardized. The naked assertion was accepted by the lower court to justify the application of Section 502 and the refusal to enjoin the strike. The Court did not require any objective evidence to support the miners' contention that the premises were unsafe. This reasoning creates a loophole by which unions can escape the arbitration provisions of their contract and engage in a strike. Since some safety aspect can be easily injected into many grievances arising in the industrial community, the decision will have an unstabilizing effect on labor-management relations.

That strikes during the term of collective bargaining agreements are a national problem is shown by the remarks of the then Assistant Labor Secretary W. J. Usery, Jr., before the Annual Institute of Labor Law of the Southwestern Legal Foundation on October 27, 1972. He pointed out that approximately one-third of all strikes occur during the term of collective bargaining agreements. In order to cope with that problem he announced:

"The Labor-Management Services Administration is currenting funding a study by the Bureau of Labor Statistics which we hope will furnish further insights into this problem. The study should reveal issues which precipitate such strikes, whether these issues were major subjects of prior negotiations, whether grievance procedures were followed, and whether the disputed issues were subject to binding arbitration." (81 LRR 227).

The decision of the lower court could aggravate this already serious problem of strikes during the contract term by permitting strikes on the bare assertion that the premises are unsafe, regardless of the contractual provisions or objective evidence relating to the alleged unsafe condition. Therefore, it is urged that this Court interpret Section 502 to require an objective test in determining whether abnormally dangerous conditions exist.

CONCLUSION

It is respectfully submitted that the encouragement of the federal policy favoring arbitration and the fostering of stable labor-management relations warrant the reversal of the decision of the Court of Appeals and the reinstatement of the Order of the District Court.

Respectfully submitted,

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May, 1973

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner,*
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

BRIEF FOR RESPONDENTS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Respondents submit that none of the four questions framed by petitioner is in fact at issue in this case. The Court of Appeals did not decide any of the four proffered questions adversely to petitioner, and had no occasion to express itself on the last two. The dispositive question of law, decided favorably to respondents below, is this:

Does the 1968 National Bituminous Coal Wage Agreement authorize work stoppages in the face of unsafe conditions at a coal mine?

COUNTERSTATEMENT OF THE CASE

This Counterstatement is needed in order to make clear what petitioner's bland account does not: That the work stoppage in the present case arose because of the gravest sort of dereliction of duty by supervisory personnel at the Gateway Mine; that the dereliction involved willful, indeed criminal, failure to carry out mine safety procedures required by law; that as a result, the lives of coal miners working at Gateway were put in jeopardy; that the walkout was undertaken as a specific protest against unsafe working conditions which were left uncorrected by petitioner and were honestly and reasonably regarded as intolerable by the men whose lives were at stake.

The Gateway Mine is extremely gassy, liberating a daily average of some 4,000,000 cubic feet of methane. (R. 16, 78.)¹ The mine is classified by the United States Bureau of Mines as "especially hazardous," requiring under the 1969 Federal Coal Mine Health and Safety Act, 30 U.S.C. § 813(i), special inspection procedures to insure the safety of the men who work there. (R. 80.) Because of the extremely gassy nature of the mine, a constant supply of air is necessary to draw off the large quantities of methane gas. If ventilation is inadequate or interrupted, the gas is permitted to accumulate and can explode from sparks caused by mechanized mining machines. (R. 68-69, 71, 80.)

No major explosion has occurred at the mine recently, but seven or eight minor explosions, called ignitions, had occurred at Gateway during 1970 and 1971. (R.

¹ Respondents will follow petitioner's citation practice—"App." refers to appendices to the Petition; "A." refers to the separately printed Appendix; and "R." refers to the appendix filed by Local 6330 in the Court of Appeals.

144.) In fact, the accumulations of gas became so serious that at least one portion of the mine was not mined for a period of time. (R. 161.) Aside from the instantaneous danger of fire and consequent burns, such ignitions pose a more substantial threat of injury if coal dust is put into suspension and then ignited causing a dust explosion. (R. 80.)

On the morning of April 15, 1971, as the night shift was finishing its work, the foremen at the Gateway Mine were to conduct a pre-shift examination as required by Section 303(d)(1) of the 1969 Coal Mine Health and Safety Act, 30 U.S.C. § 863(d)(1), which provides in relevant part:

“Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons . . . shall . . . test by means of an anemometer . . . to determine whether the air in each split is traveling its proper course and in normal volume and velocity. . . .”

The night shift foremen purportedly made the anemometer tests and made entries in the record book to the effect that air was flowing at the required level. (R. 53-55, 71-74.)

Just before 8:00 A.M., when more than 200 men on the day shift were to enter the mine, a shuttle car operator noticed a loss of air in his section of the mine. (R. 164.) He reported the condition to his foreman who then made an anemometer check and found the air to be flowing at a rate of only 11,000 cubic feet per minute. (R. 15, 18.) This is less than half the required level of 28,000 cubic feet per minute, the level supposedly ascertained by the foremen's preshift

measurements. (R. 65-66, 71-72.) The Company recognized the gravity of the apparent ventilation failure: the power was disconnected and the men ordered out of the mine—miners on the day shift who had entered were ordered to return above ground. (R. 18-19, 73-74, 148.)

The ensuing investigation revealed that a concrete overcast, a structure which channels the air delivered by the mine's ventilation system, had fallen and was preventing the proper amount of air from reaching the working faces, methane-liberating areas. (R. 14.) Records pertaining to the mine's main fan showed that the overcast must have fallen at about 4:00 A.M. (R. 18, 72, 228), prior to the pre-shift anemometer reading purportedly made by the three foremen, and some four hours before the loss of air was detected by visual means. During this four-hour interval the mine was in operation—with the normal result that methane was being liberated (R. 62)—and a mechanic's cutting torch was in use in one section. (R. 153.)

On Saturday, April 17, at the request of Local 6330, an inspection of the mine was made by federal and state mine inspectors, accompanied by Local 6330's safety committee. (R. 152-153, 229.) State Inspector J. M. Hovanic impounded the book of entries and the fan charts and notified the Company that he would prefer criminal charges against the three night-shift foremen for falsification of required entries. (R. 56, 98, 110-111.) As the Court of Appeals noted,

“The foremen had been guilty of significant dereliction. Indeed, they pleaded *nolo contendere* to a charge of criminal violation of safety requirements and were fined \$200 each.” (App. C at p. 14a.)

On Sunday, April 18, Local 6330 held a special meeting. The men were "very much concerned" about the recent events and the safety of the mine, and were "very anxious" to learn the results of the preceding day's inspection. (R. 153.) The safety committee reported that the state inspector had "seized the books" (R. 155), and that the foremen "made false entries in the record books." (R. 142, 153, 157.) The men were alarmed and outraged at falsification of ventilation records (R. 155), willful misconduct of the highest order which allowed an extremely hazardous condition to persist for hours and which was recognized even by the Company as rendering the entire mine unsafe. (R. 142, 229, 230.) The miners were aware that the behavior of the three foremen in question had fallen below accepted standards of safety numerous times in the past.² (R. 137, 140, 143, 154, 161-162.) Now, at the April 18 meeting, the miners unanimously passed a resolution to the effect that they would not work under the three foremen. (R. 137-138.)

The miners were convinced that the deliberate falsification of ventilation records, set against a pattern of unsafe supervisory conduct, proved the foremen to be wholly unreliable and a serious threat to the safe working of a mine classified "especially hazardous." (R. 115, 133-134, 142-144, 152-155.) The president of

² Already these foremen had been "brought to the local union's attention as being unfit" (R. 137); on particular occasions misbehavior by the foremen had been censured by the Local Union (R. 154), or specifically protested to management. (R. 143.) Use of a dangerous cable-coupling method known as a "West Virginia splice" (R. 142), shearing on the left side opposite the air flow (a practice prohibited by Company rules because of methane dangers) (R. 160-161), and other violations preceded the incident of April 15.

Local 6330, who attended the meeting, testified: "the men took a stand that they would not work with these foremen, that they valued their lives" (R. 133); "they didn't want to die with their boots on or they didn't want to get hurt or crippled" (R. 134); "there are so many different ways of getting hurt if you are not working safely." (R. 135.) Each miner who later testified about his reasons in voting for the resolution expressed a genuine fear for his personal safety if he were to work again under these supervisory personnel (R. 142, 143-144, 152)—"they made false entries in the record books and that proves they are not competent" (R. 142); "they were unsafe, and we had fear of our lives." (R. 152.)

In light of the miners' determination, Gateway agreed initially that the foremen would be suspended until state proceedings against them were resolved. (R. 52, 98-101, 112-113, 118.) Accordingly, the men reported for the night shift on April 18-19 and worked continuously thereafter until the agreement broke down and Gateway unilaterally reinstated two of the foremen (the third having retired) prior to the resolution of state criminal proceedings.³ (R. 52, 112, 118-19, 212.) Gateway timed the reinstatement so that it occurred the day after Memorial Day—a work stoppage then meant that the miners would forfeit their holiday pay.

³ Gateway relies on a letter from the Pennsylvania Bureau of Mines to justify reinstatement. (R. 212.) That letter was based on an *ex parte* plea by Gateway that the foremen's services were needed. (R. 91-92.) Gateway's president admitted that no information "whatsoever" was supplied to the state bureau concerning the record and performance of the foremen. (R. 93.) Thus no official investigation ever came to a conclusion different from that of the Gateway miners on the merits of the foremen's fitness.

(R. 97-98, 113-14, 194.) Nonetheless, the miners adhered to their decision and the stoppage began.

Two days after Gateway filed suit, the District Court conducted a hearing, enjoined the stoppage, and ordered that the miners submit the question "whether these men [the foremen] should return to work" to arbitration. (App. A at p. 3a.) The court did not attempt to decide the safety dispute on the merits, and in no way questioned either the *bona fides* or the reasonableness of the miners' apprehensions concerning intolerably dangerous working conditions.⁴ (App. B at pp. 8a-9a.)

The Court of Appeals, over a dissent, reversed. The Court rested its decision firmly on the narrow ground that the bargaining agreement in the present case

should not be construed as providing for compulsory arbitration of safety disputes. Accordingly, in this case neither the miners' refusal to work nor their refusal to arbitrate the safety dispute was a violation of their labor contract. There was no wrong to enjoin.⁵

(App. C. at p. 18a.)

⁴ Petitioner's brief hints that a dispute over "reporting pay" for the first shift on April 15 caused the stoppage. There is nothing whatever in the record to support this. The stoppage began on June 1, obviously because the foremen were reinstated then. (R. 112.) The complaint states that the stoppage arose directly from the safety dispute. (R. 4-5.) The district judge found this as fact. (App. B at pp. 8a-9a.)

⁵ In light of its narrow holding the Court of Appeals has not yet passed upon other arguments raised below by respondents. See note 10, *infra*, for a description of some of these alternative arguments.

A R G U M E N T

- I. THE WORK STOPPAGE AT GATEWAY MINE IS CONDUCT EXPRESSLY PERMITTED BY THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE, AND THUS THERE IS "NO WRONG TO ENJOIN."
- A. THE LEGALITY OF WORK STOPPAGES IN EMPLOYER SUITS UNDER SECTION 301 OF THE TAFT-HARTLEY ACT, 29 U.S.C. § 185, IS STRICTLY A MATTER OF THE CONTRACTUAL AGREEMENT BETWEEN THE BARGAINING PARTIES.

This is an employer's suit under Section 301 of the Taft-Hartley Act (formally, the Labor-Management Relations Act) to restrain a work stoppage. Section 301 empowers the federal courts to decide "[s]uits for violation of contracts between an employer and a labor organization," and this Court's decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), authorizes the issuance of anti-strike injunctions in some circumstances to redress the breach of a bargaining agreement.

Plainly, an employer in a suit of this kind must show that the work stoppage amounts to a contractual wrong. In order for injunctive interference to be appropriate, the collective bargaining agreement must impose a duty on the employees to refrain from stoppages over disputes that arise during the contract term, and a duty instead to submit such disputes to a grievance procedure culminating in "mandatory" arbitration. *Id.* at 253. Absent a contractual undertaking not to stop work, a stoppage cannot be enjoined or taxed with any other adverse legal consequences under Section 301. For there is "no compulsion in law" requiring American employees to forebear from striking during the term of a bargaining agreement,⁶ or to include in the agreement a no-strike pledge, and if the

⁶ In a few situations statutes may impose a duty of arbitration in lieu of self-help—see, e.g., *Brotherhood of R. R. Trainmen v. Chicago River & I. Ry. Co.*, 353 U.S. 30 (1957) (Railway Labor Act)—but no such statute obtains in the present situation.

parties do undertake to submit disputes to arbitration in lieu of self-help, "[t]he parties are free to make that promise as broad or narrow as they wish. . . ." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Their rights are wholly "a matter of contract." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

All of the above is elementary and unquestionable. So is the judicial duty, in a Section 301 case, to look closely at the bargaining agreement to determine whether the employees have or have not forfeited their right to strike.⁷ In the present case, the National Bituminous Coal Wage Agreement of 1968 is the relevant document,⁸ and the question is whether that contract permits or forbids the type of stoppage that occurred at Gateway Mine—a stoppage specifically to protest hazardous working conditions at the mine.

The first relevant feature of the present agreement is that it does not contain any express undertaking on the part of the miners to refrain from work stoppages during the term of the contract. Indeed, the agreement contains a clause expressly and emphatically disavowing any intent to impose a no-strike duty. (A. at p. 14a.)⁹

⁷ A Section 301 court must give "full play" to "the means chosen by the parties for settlement of their differences under a collective bargaining agreement." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

⁸ The 1968 Agreement was in effect at the time of the Gateway stoppage, and will be referred to herein as the "present" or "instant" agreement, though in fact it has since been superseded by the 1971 National Bituminous Coal Wage Agreement.

⁹ Paragraph 1 of the "Miscellaneous" section declares that the no-strike promises of previous agreements, such as the 1941 and 1945 agreements, "are hereby rescinded, cancelled, abrogated and made null and void." See note 34, *infra*.

The second relevant feature is the arbitration clause. (A. at pp. 13a-14a.) Petitioner's argument starts with the proposition that an implied no-strike duty may be derived from the arbitration undertaking. That clause is both general and vague, and certainly does not speak to the question of the right to stop work in the face of hazardous conditions underground. But if the only relevant contractual features were the two already mentioned, issue would be joined on the following question: whether, despite the express disavowal of any no-strike promise, such a duty may nonetheless fairly be implied from the arbitration clause on the authority of *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).¹⁰

¹⁰ Respondents' position on this broad question includes two contentions that are not restricted to safety stoppages: First that the rule of *Lucas Flour*, *supra*, should not be carried over into the *Boys Markets* setting. *Lucas Flour* involved an employer's Section 301 suit for damages caused by an allegedly illegal work stoppage, and thus this Court's ruling—that a no-strike duty might be implied from an arbitration promise—occurred in a context in which the special anti-injunction policies of the Norris-LaGuardia Act were not applicable. In the *Boys Markets* context, on the other hand, "implying a no-strike clause would subordinate to industrial peace not only freedom of contract but also the Norris-LaGuardia Act." Note, *The New Federal Law of Labor Injunctions*, 79 Yale L. J. 1573, 1600 (1970). (The question remains open since in *Boys Markets* there was an express no-strike promise in the agreement.)

Second, that even under *Lucas Flour*, it is improper to "imply" a no-strike promise of any sort from the present agreement. On this point the crucial fact is that each bituminous coal agreement since 1947 has by express language rescinded and nullified the no-strike promises of pre-1947 agreements. See note 9, *supra*, and note 34, *infra*. For more than a decade there has been a conflict among the circuits on this precise issue; indeed, this Court in *Lucas Flour* noted but declined to resolve the conflict, see 369 U.S. at 106, n. 15, and the question remains open in this Court. The most recent judicial writing on the topic comes from the Third

But that question, while a subject of briefing and argument in the Court of Appeals, was not addressed or decided below nor need it be by this Court.¹¹ For there is a third feature of the present agreement that decides this case—a specific contractual provision that expressly confers on the miners the right to walk out in protest against unsafe conditions at the mine.

B. THE COLLECTIVE BARGAINING AGREEMENT EXPRESSLY PRESERVES THE MINERS' RIGHT TO STOP WORK IN THE FACE OF HAZARDOUS CONDITIONS UNDERGROUND.

The salient fact about this case is that the collective bargaining agreement expressly provides that coal miners may stop work in the face of hazardous conditions left uncorrected by management. Almost incredibly, petitioner's brief on the merits does not even inform this Court of the specific contractual language that is at the heart of this litigation. But that disingenuous omission¹² does not change the fact that the bargaining agreement specifically permits safety walkouts by coal miners. And it follows with respect to the Gateway stoppage, as the Court of Appeals held, that there is "no wrong to enjoin." (App. C, p. 18a.)

The contractual right in question is embodied in the part of the agreement labelled "Mine Safety Program," specifically section (e) of that part. (A. at pp.

Circuit, and adopts respondents' position. See separate opinion of Judge McLaughlin, *Bethlehem Mines Corp. v. UMWA* (C.A. 3, No. 72-1466, April 6, 1973).

¹¹ Should the narrow holding of the Court of Appeals be reversed, the case should be remanded to that court for consideration of respondents' remaining arguments, including contentions sketched in the preceding footnote.

¹² Respondents' contractual arguments in both courts below centered on the provision now under discussion, as does Judge Hastie's opinion.

12a-13a.) Section (e), set out in pertinent part at the margin,¹³ deals with the Mine Safety Committees that are required to be established at every coal mine covered by the bargaining agreement. Each Safety Committee is a subordinate body of a particular UMWA local; safety committeemen are agents of their local union, paid by the local and elected by their fellow members. Among contractual powers of the safety committee are the power to "inspect any mine development or equipment used in producing coal," and "[i]n those special instances where the committee believes an immediate danger exists," the power to "clos[e] down an unsafe area" and "remove all mine workers" from the mine.¹⁴

Two key aspects of the provision described are obvious on the face of things. First, section (e) reserves to the miners, acting through a committee of their local union, the right to initiate work stoppages in the face of hazardous conditions underground. Plainly

¹³ (e) Mine Safety Committee

At each mine there shall be a mine safety committee selected by the local union. . . .

The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions for settlement of disputes.

¹⁴ See the preceding footnote.

enough, any exercise of this contractual right cannot be regarded as a breach of the contract. Second, under the contract the miners are the sole judge of whether a particular hazard is so grave and immediate that continued submission to it is intolerable. There is no occasion to invoke the provision unless the mine operator refuses to recognize the gravity of the danger or refuses to take corrective steps; in any event, exercise of the right is a matter committed to the good faith determination of the miners themselves, and is in no way conditional upon the concurrence of the operator or any governmental authority.¹⁵

The agreement, in short, specifically recognizes the miners' right to withhold services in order to induce the operator to correct conditions which the miners regard as involving intolerable danger.

1. The Bargaining History Emphatically Underscores the Miners' Contractual Right to Engage in Safety Stoppages.

The contractual provision under discussion was the fruit both of hard and deliberate bargaining by a strong union and of public and congressional outrage at slaughter in the nation's coal mines.¹⁶ The relevant

¹⁵ As Judge Hastie wrote for the Court of Appeals, "... the labor contract specifically provides that, regardless of the views or judgment of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous."

(App. C at p. 15a.)

¹⁶ "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history. . . ." *Communications Workers v. Pacific Northwest Bell Tel. Co.*, 337 F.2d 455, 459 (C.A. 9, 1964). See also *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (C.A. 7, 1970); *Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555 (C.A. 2, 1965); *Jennings v. Westinghouse Elec. Corp.*, 283 F. Supp. 308 (S.D. N.Y., 1968). Here, uniquely, the relevant bargaining history is a matter of public record.

bargaining history occurs during the period 1941 to 1947. That history includes a unique congressional inquiry into precisely the matter involved in this litigation—the contractual right of bituminous coal miners to stop work in safety disputes. The bargaining history reveals unmistakably the intended breadth of the contractual provision conferring that right, its purpose and its vital importance to the men whose lives and safety are at stake.

The 1941 bargaining agreement provided for a local union safety committee at each mine with broad powers to inspect and make reports to management, but with no power to close the mine in the face of hazardous conditions.¹⁷ In the spring of 1946 negotiations for a new national agreement centered on improved mine safety as one of the union's two major demands,¹⁸ including the specific demand that the miners be expressly authorized to stop work in safety disputes.¹⁹ Deadlock in the negotiations led to a nation-wide stoppage, and, in light of the need for uninterrupted coal production in the immediate post-war period, President Truman seized the nation's coal mines on May 21, 1946. See Executive Order No. 9728, 11 F.R. 5593. See generally *United States v. United Mine Workers*, 330 U.S. 258 (1947).

¹⁷ Appalachian Joint Wage Agreement of 1941, section entitled "Safety Practices." The 1941 agreement contained a broad no-strike clause, entitled "Illegal Suspension of Work," that altogether barred stoppages during the term of the agreement.

¹⁸ The other concerned the establishment of a welfare and retirement fund.

¹⁹ See *Minutes of the National Bituminous Coal Wage Conference*, vol. II at pp. 91-92 (April 1, 1946), 699 (April 2, 1946), 701 (April 3, 1946), and 718 (April 10, 1946).

On May 29, 1946, a new bargaining agreement (known as the Krug-Lewis agreement²⁰) was executed by the Union and the United States. The Krug-Lewis agreement "embodied far-reaching changes favorable to the miners," *United States v. United Mine Workers*, 330 U.S. at 263; in particular, the agreement expressly permitted the local union safety committees to initiate safety stoppages, though the Federal Coal Mines Administrator (Krug) was given ultimate power to halt any such stoppage if his own determination of the gravity of the danger differed from that of the miners.²¹

The occasion for congressional scrutiny of the miners' contractual right to close unsafe mines came on the afternoon of March 25, 1947, when the Centralia No. 5 coal mine in Wamac, Illinois, exploded and 111 coal miners lost their lives. The death toll of the Centralia

²⁰ Krug was Secretary of the Interior and Coal Mines Administrator; Lewis was the UMWA's International President.

²¹ National Bituminous Wage Agreement of 1946 (Krug-Lewis):

"2. Mine Safety Program

...

(b) Mine Safety Committee

...

If the Committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the Committee believes an immediate danger exists and the Committee recommends that the management remove all mine workers from the unsafe area, the operating manager or his managerial subordinate is required to follow the recommendation of the Committee, unless and until the Coal Mines Administrator, taking into account the inherently hazardous character of coal mining, determines that the authority of the Safety Committee is being misused and he cancels or modifies that authority."

disaster was the worst in almost two decades—indeed, in the quarter of a century since Centralia only one coal mine explosion has surpassed the Centralia slaughter,²² and Centralia stands today as the second worst disaster of modern coal mining.²³ In the classic mold, Centralia was caused by flagrant violations of the law and safe practice.²⁴ The ensuing congressional investigation of the Centralia tragedy came to focus directly on the role of the miners themselves in preventing such disasters, thereby throwing unique and piercing light on the contractual provision that is at the heart of this case.

Secretary Krug testified at length concerning the safety stoppage provision of the Krug-Lewis agreement before the special Senate subcommittee investigating Centralia. According to Krug, the provision was a “revolutionary reform, which the union had sought for many years”—the contractual right of the miners to close unsafe mines was one of “the two most important moves toward safety in the history of the soft coal industry.” *Hearings before the Special Subcommittee of the Senate Committee on Public Lands*, pursuant to S. Res. 98, 80th Cong., 1st Sess., at 298 and 300 (April 10, 1947) (hereinafter *Senate Centralia Hearings*).²⁵ Krug emphasized repeatedly that

²² 119 dead, Orient No. 2 mine, West Frankfort, Illinois, December 21, 1951.

²³ See generally H. Humphrey, *Historical Summary of Coal-Mine Explosions in the United States, 1810-1958* (U.S. Bureau of Mines Bulletin 586, 1960).

²⁴ See generally M. Ankeny, *Final Report of Mine Explosion, No. 5 Mine, Centralia Coal Company* (U.S. Bureau of Mines, 1947).

²⁵ The 1941 provision was admittedly “ineffectual.” *Senate Centralia Hearings* at 318.

under the agreement the local union safety committees "have complete authority to pull out the men in all cases of immediate danger," *id.* at 305.²⁶ After Senator O'Mahoney read the specific contractual language into the record, Krug testified:

"I don't think there is any dispute over the meaning of it. At least I never heard of any and it is all very simple despite the rather long, legal wording of it. It was to give the Mine Safety Committee *complete authority to get the men out of the mine if they felt the mine was unsafe. . . .*"

Id. at 312 (emphasis added). Apart from the ultimate power of the Coal Mines Administrator to override the decision of the miners, the right of the miners themselves to engage in safety stoppages was characterized in the most sweeping terms: the miners' power "to close dangerous mines" is "absolute," *id.* at 298 and 317; "complete and absolute," *id.* at 318.

Krug testified with some eloquence concerning the purpose of the provision authorizing safety stoppages. The union had made a "compelling argument," he said, that "Federal inspectors could never achieve continuous mine safety without the day-to-day participation of the miners themselves." *Id.* at 298.

"Safety depends upon day-to-day operations, and it is not a static condition. Without the active participation and cooperation of the miners, reasonable mine safety cannot be achieved. Without the minute-by-minute vigilance of these men, each one a safety expert in his own right, the mine is

²⁶ See also *Senate Centralia Hearings* at p. 317 (Krug-Lewis "authorizes the mine safety committees to close the mines where they believe immediate danger exists").

bound to revert to unsafe conditions or practices. With an active union Mine [Safety] Committee in every mine there would be a constant police force to insure against needless violations of the Code. In every mine there would be a group of experts, qualified by experience and alerted by the most rudimentary instincts of self-preservation, with power to close the mine the minute that it became dangerous.”

Id. at 301. Krug’s only complaint was that the miners were not yet exercising their contractual power with sufficient vigor, and in particular, that the Centralia safety committee should have called a safety walkout to protest the operator’s negligence. See *id.* at 304 and 312.²⁷

John L. Lewis, before the House Committee investigating Centralia, testified at length concerning the miners’ contractual right to engage in safety stoppages. *Hearings on Welfare of Miners before the House Committee on Education and Labor*, 80th Cong., 1st Sess., vol. I at 6-8, 12, 17, 24, 44, 56, 58 (April 3, 1947) (hereinafter *House Centralia Hearings*). He agreed with Krug—and his congressional interlocutors—that the contract itself allowed the miners to close unsafe mines, but explained that the miners felt constrained not to engage in any sort of stoppages during the period of government operation of the mines,²⁸ on account of the *in terrorem* effect of the 1946

²⁷ The sole surviving member of the Centralia safety committee, Mr. Maloney, testified that he had been unaware of the miners’ contractual right to stop work. *Senate Centralia Hearings* at 68.

²⁸ The Centralia mine was still operated by the federal government at the time of the disaster.

anti-strike injunction enforced by this Court in *United States v. United Mine Workers*, 330 U.S. 258 (1947). See *House Centralia Hearings* at 8, 24, 56, 58.²⁹ Lewis also noted that the 1946 agreement allowed Krug to overrule the judgment of the miners on the question of hazardous conditions. *Id.* at 7, 17.

The final Senate report on Centralia follows the testimony summarized above: it emphasizes the contractual power of the local union safety committee "to remove all mine workers from the unsafe mine," acting solely on its own assessment of danger,³⁰ and lends support to the contention that the miners' power had not yet been exercised with sufficient vigor and, in particular, should have been invoked at Centralia.³¹

On July 8, 1947, less than three and a half months after the Centralia explosion, the union and the private coal operators executed the National Bituminous Coal Wage Agreement of 1947. That private agree-

²⁹ "... a combination of the injunction and the Smith-Connally provisions caused our membership to thoroughly understand that they could close down a mine only at their own hazard." *House Centralia Hearings* at 24.

³⁰ Senate Comm. on Public Lands, *Investigation of Mine Explosion at Centralia, Ill.*, S. Rep. No. 238, 80th Cong., 1st Sess. at 10 (June 5, 1947).

³¹ *Id.* at 10-11. The Senate Report noted that since the effective date of Krug-Lewis, "in but one instance had the mine safety committee exercised its authority to close a mine"; that the UMWA had not done a thorough job of instructing local safety committeemen of their powers and duties in this regard; and that the federal Bureau of Mines "had instituted a course of instruction for the mine safety committees, but its operation at the time of the Centralia explosion was almost entirely confined to the State of West Virginia." *Id.* at 11.

ment brought forward in unqualified terms the right of coal miners to engage in safety walkouts. The provision concerning safety stoppages in the 1947 agreement is precisely the same, word for word, as the provision of the 1968 agreement invoked by the Gateway miners in the instant case.³² Moreover, the 1947 provision is identical to the provision of the Krug-Lewis agreement³³ that received so careful an explication in the Centralia hearings, with one vital exception: the clause allowing the Coal Mines Administrator to override the miners' judgment was deleted, and thereby the 1947 agreement truly made the miners' own determination "absolute," not subject to reversal by the operator or governmental authorities or anyone else. Thus the operators finally yielded to what Krug called the union's "compelling argument"—and to the mute argument of the Centralia disaster itself—that the miners should be fully empowered to act on their own in order to prevent the tragic loss of life that had occurred at Centralia.³⁴

³² Hence, for the exact wording of the 1947 provision (which also is labelled section (e) of the agreement's "Mine Safety Program"), see the 1968 provision quoted at n. 13, *supra*.

³³ See n. 21, *supra*.

³⁴ The 1947 agreement perfected the right to engage in safety stoppages by expressly rescinding and repudiating all previous no-strike undertakings on the part of the union, thus removing the possibility of anti-strike injunctions and the *in terrorem* effect Lewis had complained of in the House Centralia Hearings. The 1947 rescission clause is carried forward, word for word, in the 1968 agreement. See n. 9, *supra*. See also *United Mine Workers v. NLRB*, 257 F.2d 211, 216 (C.A.D.C., 1958):

"The 'legislative history' of the [rescission clause] is interesting and enlightening. The 1941 Appalachian Joint Wage Agreement plainly and expressly contained agreements not to strike. On July 8, 1947, the National Bituminous Coal Wage

Two concluding points may be drawn from the bargaining history.

First, the provision for safety stoppages was the fruit of long and difficult bargaining in the face of what Krug called the "violent opposition" of the private operators, *Senate Centralia Hearings* at 311, and has been maintained to the present because of continued bargaining strength. It is impossible to say exactly what benefits the coal miners gave up to secure this precious right of immense importance to them. But it is obvious that the bargaining was hard and deliberate and that the operators in July of 1947 knew full well the nature of the right they agreed to recognize. The point of all this is that it would be a travesty for the courts now to brush aside a provision having such roots.

Second, the petitioner's position in this case is built upon arguments that are simply not cognizable because they were resolved, against petitioner, at the bargaining table. For example, petitioner and petitioner's *amici* complain that recognizing the right of safety stoppages would lead to a rash of wildcat strikes only pretextually related to safety issues. But as Krug testified, that very *bete noir* was the stated reason for the operator's "violent opposition" in 1941 and 1946 and it was laid to rest in 1947 by the operators' acquies-

Agreement of 1947 was executed. The Taft-Hartley Act, with its section 301 providing for suits by and against labor unions for breach of contract, had been approved on June 23 of that year. The 1947 agreement for the first time included a 'Miscellaneous' article. Subsection 1 of that article rescinded all 'no-strike,' 'penalty,' and 'illegal suspension of work' clauses contained in earlier agreements. This was done to remove the danger that the union might be sued for breach of contract under the new statute."

cence in the union's "compelling argument" to the contrary. See *Senate Centralia Hearings* at 300-301.³⁵ In fact, the right to stop work was exercised only once in the first year³⁶ and very infrequently since. For another example, petitioner asserts that the existence of governmental powers in the area of mine safety enforcement negates the utility of the safety stoppage. But the contractual right to engage in safety walkouts was granted at the very point in history when governmental power was the greatest—when the government ran the mines—and was granted because, as Krug put it, "without the minute-by-minute vigilance" of the miners, "the mine is bound to revert to unsafe conditions or practices." *Id.* at 301. The miners' contractual power "to enforce safety on their own" was plainly intended as a vital supplement to governmental powers, see *id.* at 298-99, 301, 317-18, and it remains so.³⁷

2. The Arbitration Clause in the Present Agreement in No Way Undercuts the Bargained-For Right to Engage in Safety Stoppages.

Petitioner, as a Section 301 suitor, must find somewhere within the four corners of the bargaining agreement a contractual duty incumbent upon its employees to refrain from safety stoppages. As noted earlier, since the present agreement not only fails to include

³⁵ See also *Senate Centralia Hearings* at 311:

"Senator O'Mahoney: What was their [the private operators'] point of view?

"Mr. Krug: They were violently opposed to the mandatory powers of the mine safety committee—violently opposed.

"They said that the union had attempted to get such a provision—I think they told me since 1941—that in their judgment it was not to promote safety but as a cover-up for wildcat strikes. . . ."

³⁶ See note 31, *supra*.

³⁷ See pp. 41-44, *infra*.

any express no-strike promise but also expressly renounces any such undertaking,³⁸ petitioner is left with the contention that a duty to refrain from safety stoppages may be *implied* from the agreement's arbitration clause. In light of what has already been said, that contention is nothing short of frivolous.

The arbitration clause says that "an earnest effort shall be made" to resolve disputes of an unspecified nature through grievance discussions and arbitration if necessary.³⁹ Petitioner relies, not on the language of the clause, but on an *implication*—that is, the duty to arbitrate is said to "imply" that the employees are obliged to remain at work and submit to the disputed condition or practice pending arbitration, and then abide the arbitrator's decision.⁴⁰ The "implied" duty, in short, is the duty not to engage in any sort of self-help. Now even if the contract did not speak to the question of safety stoppages, any implication from the arbitration clause in that connection would be exceedingly weak at best—in light of the fact that this vague, catch-all clause is aimed at settling a host of problems other than the paramount problem of mine safety, and certainly does not by terms require submission to hazardous conditions while an arbitrator mulls the matter over.⁴¹

³⁸ See notes 9, 10, & 34, *supra*.

³⁹ The clause is printed in full at A., 13a-14a.

⁴⁰ Petitioner sometimes refers to Paragraph 3 of the "Miscellaneous" clause, A. at 15a, as another source of the "implication," but that language has no force independently of the arbitration clause to which it refers.

⁴¹ In the absence of an express undertaking to refrain from work stoppages, the *Lucas Flour* doctrine should not be used to "imply" such an undertaking *as to safety stoppages*, for reasons discussed in Part III.B., *infra*.

But of course there is another provision in the agreement, studiously ignored by petitioner, which makes hash out of petitioner's "implication." That provision specifically contemplates self-help instead of submission to unsafe conditions; it states plainly that the miners may make their own determination with respect to the safety of the mine and may act on that determination. Petitioner's "implication" would utterly destroy the express provision authorizing safety stoppages, and would turn the clock back to 1941. The mere suggestion is absurd, running directly contrary to the language of the contract and the whole bargaining history.⁴² The fact is that as to safety matters, the miners are not contractually obligated to await arbitration and abide the result.⁴³

⁴² The 1947 agreement, which perfected the safety stoppage right, contained an arbitration clause identical in every pertinent respect, word for word, with the present arbitration clause.

⁴³ In response to a safety stoppage an employer's only recourse under the contract is to request removal of the safety committeemen on the ground that "in closing down an unsafe area" they had acted "arbitrarily and capriciously." See note 13, *supra*. The request for removal may be arbitrated and, as petitioner and its amici well know, such arbitrations have occurred from time to time. See, e.g., *Truax-Traer Coal Co.* (No. 5308, Ill. Coal Operators Assn., 1971). But there is no contractual duty to refrain from stopping work pending arbitration of the "arbitrary and capricious" issue—indeed, absent a work stoppage there is no occasion for the employer to grieve!

Moreover, the contract gives the arbitrator no power to order the end of a safety stoppage. He may grant or deny the request for removal of the safety committeemen, and that alone. The bargaining parties knew how to confer on the arbitrator the power to "cancel or modify" the miners' action (quoted terms from the Krug-Lewis agreement, at n. 21, *supra*), and they withheld such power. Thus the contract preserves employee self-help on the mat-

Respondents' position, in a nutshell, is that express, bargained-for contractual rights are not to be defeated by "implication." "No court has shown such disdain for private ordering as to suggest the contrary. Even the purported authority for petitioner's "implication" — *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962)—teaches that a no-strike duty is not "to be implied beyond the area which it has been agreed will be *exclusively* covered by compulsory terminal arbitration." *Id.* at 106 (emphasis added). Here it plainly cannot be said that arbitration is the "exclusive" means of resolving disputes that underlie safety stoppages, since the contract expressly provides that concerted refusal to submit to a hazardous condition is a permissible means of self-production and self-help.⁴⁵

ter of greatest significance to miners, and imposes an arduous burden of proof to guard against employer reprisals.

In any event, in the present case it is not necessary to consider the scope of the arbitrator's power since Gateway never sought "arbitrary and capricious" removal and thus never triggered the limited arbitral procedure available.

⁴⁴ Even if an express no-strike clause such as that of the 1941 agreement had been retained in the present agreement, respondents believe that the safety stoppage provision still should prevail in the (hypothetical) clash of express provisions. The principle, one of the "accepted principles of traditional contract law," *Lucas Flour*, 369 U.S. at 105, is that a specific provision authorizing safety stoppages should prevail over a general no-strike provision not negotiated with an eye to the paramount problem of mine safety.

⁴⁵ Respondents object to the implication of *any* sort of no-strike promise from the present agreement; as noted earlier, there is a long-standing and unresolved conflict among the circuits on this issue. See n. 10, *supra*. But the very Courts of Appeals that have held against respondents on the broad issue have also recognized, as then-Judge Stewart put it, that

"[t]his conclusion does not make meaningless the express abrogation of a no strike clause in the . . . agreement. The right to strike was preserved with respect to all disputes not

Finally, petitioner seems to think that if safety stoppages are allowed, the arbitration clause is utterly defeated as to all matters remotely touching coal mine health and safety. This is false. Arbitration is indeed the proper way to settle unresolved disputes *except* in those rare situations when the miners regard continued submission to hazardous conditions as intolerable and elect to exercise their right of self-help. Though the miners' own judgment in making that election is final, the contract itself indicates that the right to stop work should be reserved for "special instances where the committee believes an immediate danger exists," and as might be expected, the decision to forfeit wages in order to protest unsafe conditions is rarely made. Quite wisely, the contract does not say that all "safety disputes" are excluded from the arbitration clause, but instead leaves the miners with the option of having the run of safety grievances, not involving intolerable danger, resolved through the grievance procedure culminating in arbitration if necessary.⁴⁶ The contract,

subject to settlement by other [i.e., arbitral] methods made exclusive by the agreement."

Lewis v. Benedict Coal Corp., 259 F.2d 346, 351 (C.A. 6, 1958), *aff'd equally divided on this issue*, 361 U.S. 459 (1960). Hence *Benedict Coal* refused to imply a no-strike obligation as to disputes "national in scope," finding that a clause then and now labelled Paragraph 3 under "Miscellaneous" (see A. at p. 15a) defeated any such implication based on the arbitration clause. *Accord*, *Old Ben Coal Corp. v. UMW Local 1487*, 457 F.2d 162, 164 (C.A. 7, 1972).

⁴⁶ This point is made even clearer in the 1971 agreement, executed after the Gateway stoppage and in effect today. Article III of the 1971 agreement, entitled "Health and Safety," continues the historic provision permitting safety stoppages in "special instances," and in the very next section establishes an expedited procedure for settlement of other safety disputes through grievance discussions and arbitration by safety experts. It is impossible to look at these two safety provisions of the 1971 agreement, printed one after the other, and think that either one cancels out the other.

in short, provides an arbitral mechanism for peaceful settlement of all manner of grievances but takes care to leave the option of stopping work in the face of uncorrected hazardous conditions. This is a perfectly sensible and salutary plan that is well adapted to the realities of coal mining. See generally 41 *Cincinnati L. Rev.* 943 (1972) (case comment on the decision below).

3. Injunctive Interference Is Improper Herein Since the Gateway Stoppage Is a Good Faith Exercise of the Miners' Contractual Right to Stop Work.

It remains only to ask what kind of inquiry a *Boys Markets* court should conduct when coal miners defend against an injunction suit on the ground that their work stoppage is an exercise of the contractual right to engage in safety stoppages. The answer is easily stated: a court should look into the facts deeply enough to determine whether the stoppage was motivated by the miners' apprehensions about the safety of the mine. If the court is satisfied that a *bona fide* safety dispute does in fact figure centrally in the stoppage, then it follows that the stoppage is an exercise of an express contractual right and cannot be enjoined.⁴

The test, in short, is the miners' good faith. Naturally, inquiry to determine a *bona fide* concern about safety will tend to shade into an inquiry whether there is a reasonable or at least an arguable basis in fact for the avowed concern. But the test ultimately focuses on sincerity, as the Court of Appeals recognized, be-

⁴ On the other hand, when the safety issue is trumped up and wholly pretextual, it cannot be said that the stoppage is as a matter of fact an exercise of the miners' right to engage in safety stoppages.

cause the contract allows the miners to act on their own honest assessment of danger.⁴⁸

The words of the contract, the evident design of the contract, and the bargaining history all underscore the point that the miners' *bona fides* is the only matter at issue before a *Boys Markets* court. The contract does not say that walkouts are permissible in instances of grave and immediate danger—it says that stoppages are permissible in instances “*where the committee believes*” such a danger exists. The contractual right is couched in purely subjective, discretionary language.⁴⁹

Faced with a safety stoppage the mine operator will contend that the condition or practice it has refused to correct does not pose an intolerable danger, and in any given case the hypothetical “reasonable man”—or some actual judge or arbitrator—might after a full airing of the facts be persuaded to agree with the company's position on the merits of the underlying safety dispute. But these truisms do not alter the fact that the whole point of the present agreement is to ensure a right of self-help in safety disputes and allow the miners to act on the basis of their own assessment of danger. In so acting they do not breach the agreement. That is the design of the bargaining parties, and the bargain must be honored by the courts. *Boys Markets*

⁴⁸ Petitioner claims that the Court of Appeals read a “subjective test” into Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143 and that this is error. The fact is that the court did not purport to construe Section 502, subjectively, objectively, or otherwise. See pp. 45-47, *infra*. The rights of the Gateway miners spring from their own bargaining agreement, so there is no occasion in this case to decide whether Section 502 confers independent protection.

⁴⁹ See note 13, *supra*.

courts do not sit to enforce their own notions of good policy and proper behavior, nor to decide whether one of the parties acted wisely in invoking its reserved rights under a collective bargaining agreement.

The whole of the bargaining history, recounted earlier, supports the fundamental point that the miners' own good faith assessment of danger is conclusive. In particular, it makes no difference whether government inspectors did or did not share the apprehensions of the Gateway miners. The situation at the Gateway mine, prior to the walkout, was similar to that at Centralia, where government inspectors had found safety violations but did not take the step of ordering the mine closed. By acting on their own the Gateway miners simply did what the Centralia miners were criticized—posthumously—for failing to do.

On the facts, there is no escaping the conclusion that the Gateway stoppage was squarely within the contract. Both the District Court and the Court of Appeals found that the stoppage was motivated by the miners' good faith apprehensions concerning the safety of the mine.⁵⁰ These apprehensions were grounded in specific, "objective" facts and were palpably reasonable.⁵¹ Thus the stoppage was in fact

⁵⁰ See App. B at pp. 8a-9a (District Court). As Judge Hastie wrote for the Court of Appeals,

"There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction." (App. C at p. 14a.)

⁵¹ See Counterstatement of the Case, *supra*. One indication of the reasonableness of the miners' fears, in the eyes of the District Court, is that the anti-strike injunction was made conditional upon the suspension of the foremen pending court-ordered arbitration.

an exercise of the miners' contractual right to act on their own assessment of danger in a safety dispute.

In the body of its brief, petitioner does not meet the foregoing argument because petitioner completely ignores the contractual provision authorizing safety stoppages. But certain contentions can be anticipated.

First, petitioner's Statement of the Case includes the cryptic remark that the Gateway safety committee "did not invoke or follow" contractual procedures for safety walkouts.⁵² What is meant is a mystery since not another word is said about the contractual provision in question.⁵³ Respondents agree with Secretary Krug that the provision

"... is all very simple despite the rather long, legal wording of it. It was to give the Mine Safety Committee complete authority to get the men out of the mine if they felt the mine was unsafe."

Senate Centralia Hearings at 312. Precisely that "authority" was invited here. See Judge Hastie's opinion for the Court of Appeals. (App. C at p. 15a.)⁵⁴

⁵² Petr. Brief at p. 8.

⁵³ There is a faint suggestion that petitioner believes certain undescribed formalities were not complied with, and perhaps petitioner will explain in its reply brief. Respondents leave it to the Court to decide whether rigid formalities are compatible with what Krug called the "power to close the mine the minute that it became dangerous." *Senate Centralia Hearings* at 301.

⁵⁴ After the ventilation failure at the Gateway mine, the safety committee of the Gateway local requested an investigation by state and federal mine inspectors, learned of the willful and blatant safety violations by the three foremen and reported their findings to the local membership. (R. 152-53, 155.) After discussion of the matter, the more than 200 members present at the meeting, including the safety committeemen, voted unanimously not to continue to submit to the danger perceived. (R. 137-38.) The company was informed of their determination. (R. 24.) As one of the three Gateway safety committeemen testified at trial below, the miners resolved "that we would not return to work and work with these

Second, petitioner complains that the Gateway stoppage was not confined to the third (midnight) shift. The argument is made in terms of the scope of Section 502, which is beside the point. For the Gateway miners, under the contract, were authorized to act on their view that the presence of criminally negligent foremen in an active supervisory role would lead to the creation of physical hazards, or a failure to detect and correct such hazards, thereby endangering the mine around the clock.⁵⁵ It cannot be said, and the courts below did not find, that there was any lack of good faith in this connection. Moreover, the contractual right to engage in safety stoppages is a right of protest against management's failure to take corrective steps in the face of a danger considered intolerable by the miners. The nature and scope of the danger and the propriety or wrongfulness of management's failure to act are, of course, elements of the basic dispute, and the miners are entitled to engage in self-help in support of their own views on these topics.

Finally, petitioner emphasizes that after the anti-strike injunction was issued by the District Court, an arbitration took place as ordered and the umpire found for the company on the merits of the safety dispute. But the question in this case is whether the

bosses involved in this safety issue," because "the presence of these supervisors in the mine *would render the mine unsafe*." (R. 142 (emphasis added).)

⁵⁵ The view is entirely reasonable given the nature of modern, mechanized coal mining. A foreman's failure to follow safety precautions in roof-bolting, rock-dusting, electrical repair, or any of a myriad of tasks, sets up a hazard that does not disappear at the end of the shift. A foreman's failure to conduct inspections and examinations and log data accurately obviously deprives future decision-making of vital information. Indeed, in this case the falsification of records occurred with respect to a preshift examination, and the dereliction put the incoming shift in even greater jeopardy than the foreman's own shift.

miners have a bargained-for right to act on their own views and apprehensions. Since they do, the District Court erred in enjoining the stoppage and in compelling arbitration in the place of self-help. The outcome of the arbitration herein is simply irrelevant.⁵⁶ For present purposes respondents would concede that reasonable persons—including reasonable arbitrators—might well differ on the merits of the Gateway safety dispute. The decisive point is that the Gateway miners are not contractually obliged to submit to disputed conditions and abide the decision of an arbitrator, but may elect to act on their own good faith determination, regardless of the contrary views of the company, courts or arbitrators.⁵⁷

II. THERE IS NO RATIONAL FOUNDATION FOR A "PRESUMPTION" OF ENJOINABILITY THAT WOULD OVERRIDE EMPLOYEES' EXPRESS CONTRACTUAL RIGHT TO ENGAGE IN SELF-HELP, AND NO COURT HAS EVER SUGGESTED THAT THERE IS.

Petitioner's arguments in this Court seem to turn on the assertion that the "presumption of arbitrability" set up in the *Steelworkers Trilogy*,⁵⁸ plus *Boys Markets*, equals a "presumption" of enjoinability that overrides the contractual rights asserted by the

⁵⁶ The arbitrator never doubted that the miners had made a good faith determination with regard to the safety of the mine—he simply substituted his own determination (as the District Court ordered him to do). See App. G at pp. 47a and 50a.

⁵⁷ For these reasons, the Court of Appeals ordered that the arbitrator's decision (App. G) be stricken from the record of this case. See A. at 38a. For like reasons petitioner's contention that the arbitrator's decision should be given "binding effect" is without merit.

⁵⁸ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Gateway miners. As an initial matter it would seem that any sort of "presumption" in favor of enjoinability of work stoppages, even if such a thing should exist in the law, has been fully overcome in this case. But there are far more fundamental objections.

First, while it is true that *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US. 574 (1960), did establish a "presumption of arbitrability" for use in certain Section 301 contexts, it is a complete misuse of the concept to invoke it in the present situation. In *Warrior & Gulf* there was a broad arbitration clause not qualified with respect to any specific subject, and the union brought a Section 301 suit to compel arbitration of a dispute concerning the employer's practice of contracting out work. This Court through Justice Douglas held that a Section 301 court ought not to pass on the merits of a grievance in deciding the threshold question of arbitrability, when it was the arbitrator's judgment that was bargained for.

But *Warrior & Gulf* emphasizes several times that the question of arbitrability is properly to be decided by the court, and that "any express provision excluding a particular grievance from arbitration" must be honored. 363 U.S. at 584-85.

"A specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable."

Id. at 584. Thus the "presumption of arbitrability" simply does not apply when the agreement expressly provides that a particular category of disputes may

be resolved by methods other than compulsory arbitration.⁵⁹

In short, there is no such thing as a "presumption of arbitrability" which negates the decision of the instant bargaining parties to allow self-help by employees in safety disputes. Petitioner's suggestion runs counter to the holding of *Warrior & Gulf* and to the uniform practice of the lower courts in administering *Warrior & Gulf*.⁶⁰ "[A]rbitration is a matter of contract," *id.* at 582, and "[t]he parties are free to make that promise [to submit disputes to arbitration] as broad or as narrow as they wish. . . ." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). *Accord*, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). As a matter of fact, collective bargaining agreements often limit the arbitration duty by excluding certain classes of disputes—sometimes such limitations are sought by the employer, in order to avoid the restraints which an inventive arbitrator might impose on managerial freedom of action;⁶¹ sometimes such limitations are sought by the union in order to pre-

⁵⁹ The very statement of the "presumption" in *Warrior & Gulf* makes this clear. See 363 U.S. at 581.

⁶⁰ For cases denying a union's request that the employer be ordered to arbitrate, on the ground that the dispute in question is excluded from the arbitration duty, see *Halstead & Mitchell Co. v. United Steelworkers*, 421 F.2d 1191 (C.A. 3, 1969); *General Tel. Co. v. Communications Workers*, 402 F.2d 255 (C.A. 9, 1968); *District 50, UMWA v. Chris-Craft Corp.*, 385 F.2d 946 (C.A. 6, 1967); *United Aircraft Corp. v. Lodge 971, IAM*, 360 F.2d 150 (C.A. 5, 1966); *Communications Workers v. New York Tel. Co.*, 327 F.2d 94 (C.A. 2, 1964); *cf. United Steelworkers v. General Fireproof Co.*, 464 F.2d 726 (C.A. 6, 1972).

⁶¹ See the preceding footnote.

serve the right to engage in concerted action.⁶² See generally Bureau of Labor Statistics, *Arbitration Procedures* (U.S. DOL Bulletin No. 1425-6, 1966).

"A total of 348 agreements, covering 2.2 million workers, identified one or more dispute issues as nonarbitrable. . . . It seems reasonable to assume . . . that *underlying many exclusions was a strongly held belief of one or both parties that the issue in question was too important or too subtle to be entrusted to a decision of a third party.*"

Id. at p. 11 (emphasis added).

In any event, the duty of a Section 301 court is to enforce the parties' bargain, including exclusions from arbitration and reservations of self-help as well as the duty to arbitrate in a proper case.

A second objection to petitioner's invocation of the "presumption" runs even deeper. *Warrior & Gulf* and the other cases cited so far are Section 301 suits by one of the bargaining parties (usually the union) to compel the other to submit a particular dispute to arbitration. In that setting the "pro-arbitration policy" of federal labor legislation is not offset by any countervailing statutory policy; if the court takes an overzealous view of arbitrability the only harmful result is the slight cost and vexation of proceeding with arbitration in the time it takes for the arbitrator

⁶² See *NLRB v. Deaton Truck Line, Inc.*, 389 F.2d 163, 169 (C.A. 5, 1968) ("If it has not been agreed that arbitration is the exclusive method of settling the dispute in question, a strike is not in breach of the contract"); *United Brotherhood of Carpenters & Joiners v. Hensel Phelps Constr. Co.*, 376 F.2d 731, 737 (C.A. 10, 1967) ("A failure to agree that disputes shall be resolved by binding arbitration permits the parties to resort to other remedies such as work stoppages"), *cert. denied*, 389 U.S. 952.

to reject the grievance. But the present case involves a suit for a *Boys Markets* injunction to restrain concerted employee activity, and mistaken judicial interference in this context inevitably offends the vital federal policy embodied in the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, *et seq.*⁶³

The entire tenor of petitioner's argument runs counter to the policies of the Norris-LaGuardia Act, whose purpose was to curb the abuse of the labor injunction that had done so much to sully the federal courts.⁶⁴ Petitioner proposes that the courts should resume the practice of "free wheeling judicial interference in labor relations" that the Act condemns. *Chicago & N.W. R. Co. v. United Transportation Union*, 402 U.S. 570, 583 (1971). Petitioner completely ignores the specific contractual right of self-help exercised by the Gateway miners, and instead seeks to bury the contract under a "presumption" piled on top of an "implication," the interment to take place in summary preliminary injunction proceedings without full airing of facts and law. Petitioner well knows that once an anti-strike injunction is issued, the employees' cause has been defeated even if the restraint be er-

⁶³ Sections 1 and 4 of the Act, 29 U.S.C. §§101 & 104, deprive the federal courts of jurisdiction to enjoin the peaceable concerted activities of employees. Sections 6 through 12, 29 U.S.C. §§ 106-112, impose an elaborate system of procedural safeguards to prevent abuse of the labor injunction.

⁶⁴ See generally F. Frankfurter & N. Greene, *The Labor Injunction* (1930); A. Cox & D. Bok, *Cases and Materials on Labor Law* 96-97 (1965). See also *Order of R. R. Telegraphers v. Chicago & N. W. Ry. Co.*, 362 U.S. 330 (1960); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940).

roneous and later lifted.⁶⁵ In particular, petitioner's heedless "presumption" means that strikes may be broken by the courts in the name of arbitration, even in cases where the parties never in fact agreed to arbitrate the underlying dispute, leaving the employer with a windfall victory.⁶⁶ This is nothing short of a proposal to turn the federal judiciary into an injunction-granting machine, and would seem to be fully answered by Justice Brandeis' protest of fifty years ago: "it is not for judges . . . to set the limits of permissible contest" in labor disputes. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (dissenting opinion).

Of course this Court in *Boys Markets* held that anti-strike injunctions may issue despite Norris-LaGuardia in order to enforce "the obligation that the union freely undertook" to submit to arbitration in lieu of self-help. 398 U.S. at 252. That holding flows from the need to "accommodate" and "reconcile" Norris-LaGuardia and Section 301, *id.* at 251, and the accommodation of *Boys Markets* is such that "the core pur-

⁶⁵ See Aaron, *Labor Injunctions in the State Courts—Part II*, 50 Va. L. Rev. 1147, 1157-58 (1964); 7 *Moore's Federal Practice*, ¶ 65.04[3].

"The injunctions might later be dissolved, but in the meantime strikes would be crippled because the occasion on which concerted activity might have been effective had passed. . . . Respect for the courts and the judicial process was not increased by the history of the labor injunction."

Walker v. City of Birmingham, 388 U.S. 307, 331 (1967) (Warren, C. J., dissenting).

⁶⁶ See Note, *Labor Injunctions, Boys Markets, and The Presumption of Arbitrability*, 85 Harv. L. Rev. 636, 639-42 (1972).

pose of the Norris-LaGuardia Act is not sacrificed. . . ." *Id.* at 253.⁶⁷

"Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act."

Id. The "core purpose" of the Act was and is to curb abuse of the labor injunction, to avoid free-wheeling judicial interference with the right of employee self-help. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 458 (1957). *Boys Markets* pays heed to that purpose by requiring the federal courts to take care in scrutinizing the contractual agreement of the bargaining parties, to see whether the union did or did not "freely undertake" to forbear from self-help.⁶⁸

Judicial caution is necessary in order to maintain the careful balance of conflicting congressional policies struck in *Boys Markets*. Petitioner would have the federal courts throw caution to the winds, apparently in the view that the Norris-LaGuardia Act is now a dead letter. Perhaps it is enough to say that no Court of Appeals has been so faithless to the admonitions of

⁶⁷ See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 223 (1962) (dissenting opinion adopted by the Courts in *Boys Markets*): "Congress, clearly, had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits." See also Remarks of Senator Taft, 93 Cong. Rec. 6445-46 (80th Cong., 1st Sess., June 5, 1947). See generally Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).

⁶⁸ "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect."

Id. at 254 (emphasis in original) (adopting language of the dissenting opinion in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

Boys Markets or to the command of Norris-LaGuardia as to ignore an express contractual reservation of the right of employees to engage in concerted activities. Reservations of self-help are part of the bargain that a *Boys Markets* court sits to enforce;⁶⁹ they are not overriden by any "presumption" or "implication" or other variety of judicial fiat; and they are, in fact, routinely honored by the federal courts.⁷⁰ The proper judicial approach, when a union sets up a contractual reservation of self-help, is articulated by the Second Circuit in the leading case on this topic, *Standard Food Products Corp. v. Brandenburg*, 436 F.2d 964, 966 (C.A. 2, 1970):

"Where the collective agreement, as here, excepts from the requirement of arbitration certain types of contract violations and provides that the union retains the right to strike with respect to such [employer] violations, no injunction can issue against a strike where the union presents a colorable claim that such violations have occurred. The trial judge to whom in these circumstances an application for an injunction is made has no power to decide the merits of the controversy. The parties have agreed that such a controversy is to be left to the arbitrament of economic weapons."

⁶⁹ American labor contracts articulate such reservations in a variety of ways: They may appear in no-strike and arbitration clauses themselves, elsewhere in the body of the main agreement, or in collateral agreements. See *Warrior & Gulf*, 363 U.S. at 579, n. 5, and 584. See generally Bureau of Labor Statistics, *Arbitration Statistics* (U. S. DOL Bulletin No. 1425-6, 1966).

⁷⁰ See, e.g., *Martin Hageland, Inc. v. United States Dist. Co.*, 460 F.2d 789, 791 (C.A. 9, 1972) ("Federal courts have no jurisdiction to order the union to forego the remedy it received at the bargaining table"); *Association of Gen. Contrs. v. Illinois Confer. of Teamsters*, 454 F.2d 1324 (C.A. 7, 1972); *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A. 2, 1971), cert. denied, 405 U.S. 934 (1972); cf. *McCord, Condron & McDonald, Inc. v. Carpenters Local 1822*, 464 F.2d 1036 (C.A. 5, 1972).

III. CONTRACTUAL RETENTION OF THE RIGHT TO ENGAGE IN SAFETY STOPPAGES IS IN LINE WITH PUBLIC POLICY.

Respondents' fundamental insistence is that this is a contract case, calling for the purposive construction and application of a particular bargaining agreement. The contractual provision at the heart of the case pertains specifically to safety disputes, but it is not strictly necessary for this Court to consider the special congressional policies in the area of job safety in order to affirm the right of the Gateway miners to engage in self-help. Of course, job safety is a mandatory subject of bargaining between union and management,⁷¹ and at the present time it happens that "clauses, protecting safety or health walkout[s] under allegedly abnormal conditions, are being sought by more and more unions."⁷² Such bargains, when struck, must be honored by the courts under the most elementary notions of Section 301 laws.

Nonetheless, a brief inquiry into the policies of federal job safety legislation is in order. For if contract interpretation may be aided by an understanding of public policy, as petitioner would concede, then surely all of the policies that bear on a given case should be considered. And the fact is that at least three congressional enactments affirmatively support and

⁷¹ See *NLRB v. Gulf Power Co.*, 384 F.2d 822 (C.A. 5, 1967); cf. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

⁷² Bureau of National Affairs, *OSHA and the Unions: Bargaining on Job Safety & Health* at 35 (1973).

"Chairman Robert D. Moran of the OSHA Review Commission . . . predicted that more 'imminent danger clauses would be appearing in labor-management contracts.'"

...
"In pressing for 'imminent danger' clauses, the unions seek to go beyond statutory guarantees."

lend the weight of strong public policy to the miners' contractual retention of the right to stop work in safety disputes.

A. EMPLOYEE SELF-HELP IN SAFETY DISPUTES COMPORTS WITH THE POLICY OF THE COAL MINE HEALTH AND SAFETY ACT OF 1969, THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, AND SECTION 502 OF THE TAFT-HARTLEY ACT.

1. The Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq.

The chronology of federal coal mine safety legislation follows the calendar of major mine disasters: enactments came in 1947, the year of Centralia; in 1952, after the West Frankfort disaster set the modern record for lives lost; and in 1969, after 78 miners died in the explosion of Consolidation Coal's No. 9 Mine at Farmington, West Virginia.⁷³ Coal mining remains the most hazardous industry in America,⁷⁴ and it is virtually a truism that, as the preamble to the 1969 enactment says,

"There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm. . . ."

30 U.S.C. § 801 (c).

The coal miners' retention of the right to engage in safety stoppages is just such a "means . . . to prevent death and serious physical harm." The committees of Congress that drafted the 1969 legislation were fully aware both of the vital role the union must play in

⁷³ See House Committee on Education and Labor, *Legislative History, Federal Coal Mine Health and Safety Act* (1970) at 4-6 (S. Rept. No. 91-411 on S. 2917, 91st Cong., 1st Sess.); *id.* at 559-560 (H.R. Rep. No. 91-563 on H.R. 13950, 91st Cong., 1st Sess.).

⁷⁴ Bureau of Labor Statistics, *Injury Rates by Industry, 1970*, at 4 (Report No. 406, 1972).

obtaining mine safety enforcement, and of the specific contractual provision that accords a right of self-help in safety disputes.⁷⁵ Senate oversight hearings conducted in 1970 focused closely on the role of the UMWA Safety Committees in enforcing coal mine safety.⁷⁶ Significantly, at the time of the 1970 Hearings the enforcement performance of the U.S. Bureau of Mines was judged by Senator Harrison Williams, principal author of the 1969 Act, to be "outrageous . . . just plain unbelievable."⁷⁷

There is little need to belabor the point that the contractual right to engage in safety stoppages is in

⁷⁵ See, e.g., *Hearings on S. 355, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., pt. 1, at 466 (1969) (testimony of former UMWA President Boyle):

" . . . the operators vigorously opposed that section of the contract, but it is in there now and it is effective. . . . If there is imminent danger existing then the committee is empowered to withdraw those men from that hazardous area until such time as it is corrected."

Both the contractual right and the problem of employer reprisals against miners who invoke it were discussed at the Senate hearings. See *id.* at 466-67; *id.*, pt. 2, at 791 (testimony of UMWA safety committeeman Wolford).

⁷⁶ See *Hearings on Health and Safety in the Coal Mines Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970), at 23 (testimony of Gateway safety committeeman Ozonish), 26-27 (testimony of Gateway safety committeeman Price), 353-54 (colloquy initiated by Senator Schweiker's comment that "under the present contract your mine safety committee of three members can shut down a mine if it is unsafe").

Safety problems at the Gateway mine figured prominently in the 1970 oversight hearings. See, e.g., *Hearings, supra*, at 4-22 (official reports of safety violations at Gateway). Gateway miners testified specifically concerning the negligence of supervisors in safety matters, *id.* at 351, and, remarkably, complained of the practice of "not testing for gas." *Id.* at 27. This testimony was given almost a year before the Gateway stoppage that gave rise to the present case.

⁷⁷ *Senate Hearings, supra*, at 191.

line with the congressional policy embodied in the 1969 Act, which begins with the declaration that

“The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner. . . .”

30 U.S.C. § 801(a). Petitioner’s suggestion that the contractual right to self-help is undercut by the existence of governmental safety enforcement powers is nonsense. From the beginning in 1946, through the period of congressional activity in 1969 and thereafter, the contractual role of the miners in enforcing safety has been recognized as a necessary supplement to governmental enforcement.⁷⁸ The union of coal miners would be a sorry operation indeed if it came to rely solely on federal officials for enforcement of mine safety.⁷⁹ Today the U.S. Bureau of Mines, in con-

⁷⁸ Petitioner suggests that there is no longer a need for safety stoppages in light of the fact that federal mine inspectors, under the 1969 Act, are empowered to close mines in cases of imminent danger. See Petr. Brief at 21. Perhaps petitioner is unaware that the worst disaster since Farmington (Hyden, Kentucky, December 30, 1970, 38 dead) could have been prevented had federal inspectors used these powers, but they did not. *Report of General Subcomm. on Labor of the House Comm. on Education and Labor, Investigation of the Hyden, Kentucky, Coal Mine Disaster*, 92d Cong., 1st Sess., at xi-xii (1971). The Report states that “[m]any of the miners killed looked hopefully but vainly to the Bureau for closure. . . .” *Id.* at XIII. They had to look to the U. S. Bureau of Mines because Hyden mine was nonunion. See *id.* at 78.

⁷⁹ To put the matter mildly, the U. S. Bureau of Mines has been criticized for lack of vigor in enforcing the 1969 Act. See, e.g., GAO Report to the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare (No. B-170686, May 13, 1971) (problems in implementing the 1969 Act); GAO Report to the Subcomm. on Conservation and Natural Resources of the House Comm. on Govt. Operations (No. B-170686, July 5, 1972) (problems in assessment and collection of penalties under the 1969 Act). Recently the Bureau’s scheme for assessing penalties for safety violations—the very heart of enforcement—was struck down. *National Indep. Coal Operator’s Assn. v. Morton*, 357 F. Supp. 509 (D.D.C., 1973).

nection with Pennsylvania State University, is conducting a special training program for all UMW local safety committeemen,⁸⁰ plainly in recognition of the need for what Krug called "the minute-by-minute vigilance" of the miners themselves.

2. The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq.

The 1970 legislation (OSHA) is not directed to the particular problems of bituminous coal miners, but like the 1969 enactment it evinces a strong congressional concern to accomplish effective enforcement of job safety and diminution of "personal injuries and illnesses arising out of work situations," which result in death or disability. 29 U.S.C. § 651.⁸¹ The OSHA has been interpreted by the agency responsible for its enforcement, the Department of Labor, as creating a right of employee self-help in the face of hazardous work conditions which exists entirely independently of other statutes and bargaining agreements.⁸² This

⁸⁰ Contract No. S0133019, "Special Health and Safety Seminars for Authorized Representatives of Miners," U. S. Bureau of Mines, Branch of Contracts and Grants. Such training efforts began in 1946. See note 31, *supra*. See also *Senate Hearings on Health and Safety in the Coal Mines*, *supra* note 76, at 31 ff.

⁸¹ "The problem of assuring safe and healthful work places for our working men and women ranks in importance with any that engages the national attention today." Senate Comm. on Education and Labor, *Legislative History of the Occupational Safety and Health Act of 1970* (1971) at 2 (S. Rept. No. 91-1282 on S. 2193, 91st Cong., 2d Sess.).

⁸² 38 Fed. Reg. 2681-83 (Jan. 29, 1973) (amendment to 29 C.F.R. pt. 1977, pursuant to § 8(g)(2) of OSHA, 29 U.S.C. § 657(g)(2) :

§ 1977.12. Exercise of any right afforded by the Act.

"(b)(2) However, occasions might arise when an employee is confronted with a choice between performing

fact alone belies petitioner's suggestion that the OSHA draftsmen intended to discourage employee self-help or doubted its utility and rationale.⁸³ In fact, the passage of OSHA has helped to spur collective bargaining on questions of job safety: The Chairman of the OSHA Review Commission has predicted that more "imminent danger clauses would be appearing in labor-management contracts," clauses going beyond both OSHA and Section 502 of the Taft-Hartley Act. Bureau of National Affairs, *OSHA and the Unions: Bargaining on Job Safety & Health* at 35 (1973).

3. Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143.

This provision is the third repository of congressional policy that supports employee retention of the contractual right to engage in safety stoppages.

Section 502, *in pari materia* with Section 301 of Taft-Hartley, provides that "the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work" shall not "be deemed a

assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

⁸³ The "legislative history" cited by petitioner is completely beside the point. It all pertains to a rejected House provision that would have allowed stoppages "with full pay" (see Petr. Brief at 22) to protest specific employer violations.

strike under this Act.”⁸⁴ The provision reflects a congressional judgment that “[a] protest against unsafe working conditions, specifically protected by the Act, is as vital a union activity as a strike in support of bargaining activities.” *NLRB v. Great A & P Tea Co.*, 340 F.2d 690, 696 (C.A. 2, 1965). A Section 502 walkout is concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157. Even in the face of an express no-strike clause making no exception whatever for safety disputes, a stoppage in good faith because of abnormally dangerous conditions can neither be enjoined nor penalized in any other fashion. See, e.g., *Philadelphia Marine Trade Assn. v. NLRB*, 330 F.2d 492 (C.A. 3, 1964), *cert. denied*, 379 U.S. 833 & 841; *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (C.A. 6, 1957), *cert. denied*, 357 U.S. 927 (1958).

It is important that the place of Section 502 in the argument before this Court be carefully outlined, since petitioner devotes two argument headings to an imaginary contest about the independent force of the provision. This is a contract case, not a Section 502 case; the right of the Gateway miners to stop work, upheld by the court below, is a contractual right. Since the present agreement does not forbid self-help in safety disputes, the question of Section 502's independent application does not arise.⁸⁵

Respondents point to Section 502, as well as the Coal Mine Health and Safety Act and OSHA, for the

⁸⁴ For legislative background of the provision see S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., at 30 (1947); *Knight Morley Corp.*, 116 NLRB 140, 146, 38 LRRM 1194, 1195 (1956), *enf'd.*, 251 F.2d 753 (C.A. 6, 1957), *cert. denied*, 357 U.S. 927 (1958).

⁸⁵ That the Court of Appeals held for respondents on contractual, not statutory grounds, is made perfectly plain in Judge Hastie's opinion. See App. C at p. 18a.

limited purpose of showing that the contractual right of miners to engage in safety stoppages comports with congressional policy. The object of Section 502 is "to protect the right of employees to quit their labor without penalty in order to protect their health and their lives," *Knight Morley Corp.*, 116 NLRB 140, 146, 38 LRRM 1194, 1195 (1956), *enf'd, supra*, and that is certainly a relevant fact for a court to consider in construing the present agreement. The Court of Appeals viewed Section 502 as expressive of pertinent "public policy" (App. C at 17a), since naturally contracts should be construed in line with public policy when that is reasonable.

It follows that petitioner is mistaken in saying that the Court of Appeals opted for a "subjective" rather than an "objective" test in Section 502 litigation. The Court of Appeals had no occasion to opt either way. First—and to repeat—the privilege accorded safety walkouts by the lower court is a contractual privilege, not one founded in federal statutory law. The miners' good faith apprehensions govern this case because the contract says so. The scope of the contractual privilege is a matter for collective bargaining. Second, this is not a case in which the miners acted out of a purely "subjective," unsupportable whim or caprice. The record contains a multitude of "objective" facts which give rise to the miners' intense, honest, reasonable, good faith fear for their own safety and to their willingness to forego their pay rather than submit to working conditions they rightly regarded as intolerable.⁸⁶

⁸⁶ Among the "objective" facts noted by the court below are the foremen's failure to carry out safety procedures; their criminal prosecution for falsification of safety records, and their *nolo* pleas; prior complaints about their unsafe practices; the emergency condition that resulted from their willful misconduct in the present

B. THE COURT OF APPEALS QUITE RIGHTLY CONSIDERED THE SPECIAL FEATURES OF SAFETY DISPUTES IN CONSTRUING THE PRESENT AGREEMENT.

Contrary to the broad assertions of petitioner's first two argument headings, the Court of Appeals did not set up any inflexible, mechanical rule barring *Boys Markets* injunctions in all safety stoppages regardless of the contractual setting. What the lower court did was simply to consider certain features of safety disputes which do, in a just sense, render them "*sui generis*."

The normal contract grievance concerns a dispute over an economic issue (wages, hours, work assignment, seniority, vacations, and so on). When the bargaining agreement gives up the right to stop work, there is no special justification for employees not to continue on the job and submit to the disputed condition while the underlying economic issue is resolved through the grievance and arbitration process. Self-help in the ordinary situation is, like arbitration, a means of resolving the particular dispute; the purpose of self-help is to induce resolution favorable to the strikers. The only harm from submitting to the disputed condition pending arbitration would be economic and compensable by an arbitral award.

But of course every situation is not the normal one. For example, when an employer engages in a campaign of unfair labor practices, or systematically disregards the agreement and manufactures disputes to undermine the union, a threat to the very integrity of the bargaining relation exists. This Court has recognized that employee self-help has a special justifica-

case; and Gateway's failure to take corrective steps. For a fuller account see Counterstatement of the Case, *supra*.

In the Court of Appeals respondents argued that the present stoppage comes well within the Section 502 test used by the NLRB, which requires that the good faith apprehensions of employees have some reasonable basis.

tion in such situations and is permissible even in the face of an express and unqualified no-strike promise. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). See also *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957).

A safety stoppage is likewise not the typical case. The costs of submitting to the disputed condition are quite different than in the normal economic case—they may include life and limb. A safety stoppage is not an act of economic warfare to induce a favorable economic outcome, but is an act of concerted self-preservation and self-protection. This fact is recognized in Section 502, which operates even in the face of an express no-strike clause. Public policy, not to mention good sense, does not require submission to hazardous working conditions while an arbitrator's decision is awaited.⁸⁷ Indeed, arbitrators themselves routinely prohibit discharge or disciplining of employees who refuse to submit to hazardous conditions—and the test used in these cases, as a matter of arbitral “common law,” looks to good faith on the part of the employees.⁸⁸

Thus an arbitration clause by itself simply is not “‘instinct with an obligation,’ imperfectly expressed,” *Wood v. Lucy*, 222 N.Y. 88, 118 N.E. 214 (1917)

⁸⁷ See generally 41 *Cincinnati L. Rev.* 943 (1972) (case comment on decision below).

⁸⁸ See, e.g., *Tremco Mfg. Co.*, 72-1 CCH Arb. ¶ 8292, 4006; *Rohr Corp.* 71-2 CCH Arb. ¶ 8529, 4960; *Morton Salt Co.*, 70-2 CCH Arb. ¶ 8462, 4519; *Ohio Edison Co.*, 70-2 CCH Arb. ¶ 8445, 4457; *U. S. Steel Corp.*, 70-2 CCH Arb. ¶ 8708, 5335; *A. M. Castle & Co.*, 64-1 CCH Arb. ¶ 8102, 3348; *La Clede Gas Co.*, 39 Lab. Arb. 833 (1962). The intellectual foundation of these decisions is the arbitral opinion of the late Dean Harry Shulman in *Ford Motor Co.*, 3 Lab. Arb. 779 (1944). Dean Shulman explains why it is normally fair to ask employee obedience to a disputed order or practice pending grievance discussions, while making clear that obedience is not to be exacted when it involves “an unusual health hazard or other serious sacrifice.” *Id.* at 780, 782.

(Cardozo, J.), to refrain from self-help in safety disputes.

The Court of Appeals quite properly brought these considerations to bear on the instant case. Here, after all, there is no express no-strike undertaking whatever—the contract affirmatively disavows any such duty. Here the arbitration clause is the only basis for implying a duty to refrain from self-help and submit to disputed conditions, and certainly any no-strike implication, if warranted at all,⁸⁹ should not extend to safety stoppages, where submission involves jeopardy of life and limb. The federal labor policy discussed in the last several pages requires that labor agreements not be construed to forfeit employee's right to stop work over safety disputes, in the absence of any express contractual no-strike duty. There is nothing in *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962), suggesting an opposite approach: *Lucas Flour* speaks to the ordinary situation in which arbitration is "a substitute for economic warfare." *Id.* at 105. The Court of Appeals' unwillingness to imply a duty to submit to hazardous conditions is understandable on this ground alone, though of course a no-strike implication as to safety disputes is completely negated in any event by the express contractual reservation of self-help in safety disputes.

Close attention to relevant public policy is an essential judicial duty in *Boys Markets* cases. The substantive law in all Section 301 cases must be drawn "from the policy of our national labor laws," *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and decisions rendered "according to the precepts of federal labor policy." *Lucas Flour*, 369 U.S. at

⁸⁹ See n. 10, *supra*.

103. "[C]onsideration must be given to the total corpus of pertinent law and . . . policies. . . ." *Boys Markets*, 398 U.S. at 250. See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-50 (1964).

Here the petitioner has pointed to but one of many relevant, sometimes competing policies—the policy favoring peaceable settlement through arbitration of normal contract grievances of an economic nature. Sound analysis shows that this undoubted policy is attenuated in the safety context. Moreover, that policy is met in the present case by strong countervailing policies, among them (a) the anti-injunction policy of *Norris-LaGuardia*, requiring cautious administration of the labor injunction; (b) the policy of Section 502, of the OSHA, and of the common law of arbitration, favoring employee self-help in the face of hazardous working conditions; and (c) the emphatic policy of the Coal Mine Health and Safety Act of 1969, and predecessor legislation, favoring effective enforcement of mine safety by the miners themselves.

The focal point of this case, on which all relevant federal policies converge, is the express contractual reservation of self-help by coal miners in safety disputes. That provision plainly builds upon and advances the affirmative policies of the law. The duty of a *Boys Markets* court, in sum, is to honor that contractual choice and give it "full play." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

CONCLUSION

According to petitioner, the path of decision herein is marked by a "presumption" drawn from *Warrior & Gulf*, an "implication" on the authority of *Lucas Flour*, and by *Boys Markets*' "accommodation" of

Norris-LaGuardia rights. The end result sought is nullification of coal miners' historic contractual right not to submit to intolerable jeopardy of life and limb. Such logic invites quotation of the recent admonition of the Chief Justice in *United States v. 12 200-Ft. Reels*, 41 USLW 4961, 4962 (1973):

"The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line-drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"

In *Boys Markets* itself, the Court cautioned against the granting of anti-strike injunctions "as a matter of course in every case." 398 U.S. at 254. Respondents submit that in this case, the line that marks the limit of intervention must be drawn.

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1973

GATEWAY COAL COMPANY,
Petitioner

v.

**UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF FOR THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AND FOR THE
INTERNATIONAL UNION UAW
AS AMICI CURIAE**

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Supreme Court of the United States

October Term, 1973

No. 72-782

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Petitioner

v.

**UNITED MINE WORKERS OF AMERICA;
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AND FOR THE
INTERNATIONAL UNION UAW
AS AMICI CURIAE**

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW, file this brief amici in support of the position of the respondent unions with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and thirteen affiliated labor organizations having a total membership of approximately thirteen and one-half million working

men and women. It is thus the majority spokesman for organized labor. The International Union UAW, with a membership of over one million five hundred thousand, is the nation's largest industrial union.

SUMMARY OF ARGUMENT

This is a strike injunction case arising out of a work stoppage over a safety dispute. If, as respondent unions argue, and the court below held, that dispute was not subject to the arbitration provision of the applicable collective agreement, the injunction was improper. *Boys Markets v. Clerks' Union*, 398 U.S. 235. We agree. But even if, as petitioner contends the safety dispute was indeed arbitrable it would not follow that the injunction was proper. *Boys Markets* establishes additional criteria which must be met before a strike injunction may be entered, *id.* at 253-254, but were not in this case. In order that all the issues in the case be ventilated, we address ourselves to these alternative grounds for affirmance.

Preliminarily, we begin with the precise terms of the injunction. As an adjunct to enjoining the work stoppage, the District Court directed arbitration, as *Boys Markets* clearly required. *Id.* at 254. Additionally, the Court abated the allegedly unsafe condition pending arbitration. This step too was clearly required by the basic principle (applicable under *Boys Markets*, *id.* at 254) that a "court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate." *Harris Stanley Coal and Land Co. v. Chesapeake & Ohio Ry. Co.*, 154 F.2d 450, 453 (C.A. 6); cf. *Hanna Mining Company v. United Steelworkers*, 464 F.2d 565 (C.A. 8). However, the District

Court erred in providing that if the arbitration was in favor of the Company, it would be given automatic injunctive force by reinstatement of the foremen (whose failure to abide by safety requirements had caused the work stoppage) while preserving the restraint against further stoppages. The effect of this portion of the order was to enforce the arbitration award before it was rendered and without judicial scrutiny to insure fidelity to the agreement and public law. *United Steeworkers v. Enterprise Mfg. Corp.*, 363 U.S. 593, 597; *Local 453, etc. v. Otis Elevator Co.*, 314 F.2d 25, 29 (C.A. 2).

1. The strike injunction did not meet the precondition of *Boys Markets* that the court find that "breaches are occurring and will continue, or have been threatened and will be committed"; i.e., in cases such as the instant one that there are "violations of [the union's] no-strike obligation." 398 U.S. at 254.

(a) A strike over an arbitrable issue is not automatically a breach of the collective agreement; the obligation not to strike pending arbitration exists only where it is "freely undertaken" as a matter of contract. See *id.* at 252. There can be no doubt that § (e) of the provisions setting out the "Mine Safety Program" in this collective agreement, taken against its background of the deletion of all no-strike commitments, constitutes an express reservation of the right to strike where a local union "believes an immediate danger exists." And the court below held that the record establishes that the instant strike did come within the scope of § (e).

(b) Even if § (e) of the agreement did not preserve the miners' right to utilize an economic weapon against the

employer over safety issues, Gateway's employees retained an elemental right of self-protection, recognized both by the common law of collective agreements, and by §502 of the Labor Management Relations Act of 1947, which entitled the miners, who honestly and reasonably believed that the working conditions set by the Company endangered their life or limb, to refuse to work under those conditions without violating the collective agreement. Since the seminal decision of Dean Shulman in *Ford Motor Co.*, 3 L.A. 779, it has been understood throughout industry that the ordinary duty of employees to obey management's directions even when these are believed to be in violation of the agreement, and then to grieve, does not govern where the employees reasonably believe that "the improper order *** involves an unusual hazard or other serious sacrifice." *Id.* at 780; see also ,e.g., *Laclede Gas Co.*, 39 L.A. 833.

The same result follows from § 502 of the Act:

"nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

This was the square holding of the leading § 502 decision, *NLRB v. Knight-Morley Corp.*, 251 F.2d 753 (C.A. 6), cert. denied, 357 U.S. 927; see also *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (C.A. 3), cert. denied, 379 U.S. 833, and Pet. App. p. 17a. The contrary view espoused by petitioner and the dissent below would read the "good faith" language out of § 502, and place upon the employee the unconscionable dilemma of risking his life or his livelihood.

2. The strike injunction also did not meet the preconditions of *Boys Markets* that an injunction may not issue unless the District Court determines that the breaches "have caused or will cause irreparable injury to the employer; and [that] the employer will suffer more from denial of an injunction than will the union from its issuance." 398 U.S. at 254 preserving § 7(c) of the Norris-LaGuardia Act. The District Court made no finding whatsoever with respect to the potential injury to the respondent unions, and therefore could not begin to perform its duty to balance their equities against those of Gateway. Additionally, although the District Court stated in conclusory terms that the Company would suffer irreparable injury if the injunction were denied, its only findings on the subject fall far short of supporting that conclusion. That Court did not find that Gateway, the employer, would suffer any injury; nor could it have done so since its sole product, coal, is not perishable, and Gateway's only "customers" are the three corporations who are the Company's co-owners, and take its total supply. What the District Court did find was that the strike would cause injury "in due course" to one of the owning companies, Jones & Laughlin, and to the public. But, quite aside from the lack of immediacy of the injury found (there being a 20-day supply of coal above ground at the time the strike was stopped by the District Court), neither qualifies as the "employer or the "complainant" as § 7(c) requires. For only Gateway was the miners' employer, to whom the respondent unions were contractually bound, and only Gateway could become a "complainant" by suing to enjoin the alleged breach.

ARGUMENT

This litigation had its inception in a work stoppage in response to Gateway Coal Co.'s decision to reinstate two assistant foremen who "had made false entries in their log books," in violation of federal safety requirements, "that failed to disclose that the flow of air through a work area was 11,000 cubic feet per minute as contrasted with a normal 28,000 cubic feet, [a condition which] increased the danger of the accumulation of dust and flammable gas and the risk of consequent explosion." Pet. App. pp. 13a-14a.¹ The Company's reinstatement decision was made even "though criminal proceedings against [the foremen] were still pending," and even though "some 200 Gateway employees [had] attended a special union meeting and unanimously voted not to work under the assistant foremen in question." Pet. App. 13a-14a.²

The Company brought this action under § 301 of the Labor Management Relations Act of 1947 (hereafter "the Act"), to enjoin the work stoppage and to direct respondent unions to arbitration under the "Settlement of Local and District Disputes" provision of the National Bituminous Coal Wage Agreement. A. pp. 3a-9a. The District Court

¹ "Pet. App." references are to the appendices to the petition for certiorari in this case. "A." refers to the Appendix in this Court.

² Gateway placed great reliance on the Commonwealth of Pennsylvania's determination not to institute proceedings to suspend the foremen's licenses. But that determination was not based on a conclusion that the foremen had not made false entries, and it did not counsel the Company to return them to their supervisory positions; it merely left Gateway "at liberty" to do so. A. pp. 16a-17a.

entered a temporary restraining order (Pet. App. pp. 1a-4a), later declared to "constitute a preliminary injunction without change until further order of this Court" (Pet. App. p. 10a). The injunction embodied the following restraints:

"First, the employees of the Gateway Mine, their officers and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:

(a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.

(b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issue stated forthwith and as soon as the hearing can be held, and neither party to this agreement—that is, the union agreement—shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.

(c) The decision of the umpire will be final and both parties will be bound by that decision." Pet. App. p. 3a.

The Court of Appeals reversed. That Court determined that the dispute was not arbitrable. Pet. App. pp. 12a-19a.

This determination was sufficient to require that the injunction be set aside in its entirety. *Boys Markets v. Clerks Union*, 398 U.S. 235, does "not undermine the vitality of the Norris-LaGuardia Act" (*id.* at 253), but authorizes an injunction only if the agreement "*does*" require the parties to arbitrate a particular dispute (*id.* at 254, emphasis in original). Thus, if, as the union respondents urge in their brief, and as we agree, the Court of Appeals was correct in concluding that, under this particular agreement, this particular dispute was not arbitrable, the judgment below must be affirmed.

But contrary to the view of the Company and the amici who support it here, the converse does not follow; *Boys Markets* itself makes clear that there is no automatic progression from arbitrability to injunctive relief: "Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Id.* at 253-254.

Because the District Court failed to comply with the standards established in *Boys Markets*, we submit that even assuming *arguendo* that the underlying safety dispute was arbitrable, its injunction against the strike (that paragraph of its order which begins "First") was wrong as a matter of law.³

In urging that the District Court's strike injunction

³ Once the District Court enjoined the work stoppage, paragraph "(a)" of the injunction was mandated by equitable principles as we develop in the text. Moreover, paragraph "(b)" directing the parties to arbitration of the dispute, was, of course, required by *Boys Markets*.

However, even if the strike injunction was otherwise legally cor-

was properly reversed by the Court of Appeals, we do not adopt that portion of the latter's opinion which states that arbitration of safety disputes is not to be encouraged. Pet. App. pp. 16a-17a. While the collective agreement in this case does not provide for arbitration of grievances arising from employee complaints about conditions which they believe to be unsafe, these are, in other industries, familiar and valuable adjuncts of collective bargaining. There, the gravity of the stakes, correctly and eloquently described by the Court of Appeals (Pet. App. pp. 16a-17a), is accommodated, not by eliminating arbitration, but by reversing a generally applicable rule of industrial relations and permitting the employees to refuse, pending arbitration,

rect, paragraph "(c)" thereof was erroneous and should be set aside. For, when paragraph "(e)" is read in light of the Memorandum, it gives injunctive effect to the arbitration award even though the arbitration had not yet been held:

"Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be returned to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working." Pet. App. p. 4a.

This of course was clear error. For even assuming that the parties had provided for final and binding arbitration, as the District Court determined, the award rendered by the arbitrator was not automatically enforceable. This is established by the very case on which petitioner relies, *United Steelworkers v. Enterprise Mfg. Co.*, 363 U.S. 593, 597. Moreover,

"It is no less true in suits brought under § 301 to enforce arbitration awards than in other law suits that the power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States.*** The public policy to be enforced is a part of the substantive principles of federal

to perform work which they reasonably believe to be unsafe. See pp. 17-20 *infra*. The order of the District Court was in harmony with that practice, because paragraph "(a)" thereof abated the dangerous condition by suspending the foremen involved pending the arbitration.

The propriety of that condition is not disputed by any of the parties or the amici in this case. Nevertheless, the point is of sufficient importance for future litigation concerning work stoppages over arbitrable safety disputes that the lower federal courts should be instructed that the indispensable precondition for an injunction against such work stoppages is a direction by the court requiring that the allegedly unsafe conditions be abated until the arbitrator's

labor law which federal courts, under the mandate of *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, are empowered to fashion." *Local 453, etc. v. Otis Elevator Co.*, 314 F.2d 25, 29 (C.A. 2)

Thus, before enforcing an award in a safety case the court must determine both that the award "draws its essence from the collective bargaining agreement" (*Enterprise*, 363 U.S. at 597), and that it is consistent with § 502 of the Act. dismissed at pp. 21-24 *infra*. See, e.g., *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272.

Since the award was made subsequent to the District Court's decision, that Court has not yet performed its duties under *Enterprise*. Accordingly, even if all other issues were decided in favor of petitioner, the sound disposition of the case (28 U.S.C. § 2106) would be to vacate part "(c)" of the injunction, as amplified in the opinion, and to remand the case to the District Court. It would seem inappropriate for this Court to review the arbitration award in the first instance, since it is not part of the record despite petitioner's attempt to treat it as such by reprinting it as an appendix to the petition for certiorari. The Court of Appeals struck the Company's supplemental appendix consisting of the arbitration award (A, 38a), and the petition did not seek review of that order.

award is either accepted by the union or subjected to judicial review in enforcement proceeding pursuant to *Enterprise*. See pp. 8-10, n. 3 *supra*. The decision in *Hanna Mining Company v. United Steelworkers*, 464 F.2d 565 (C.A. 8), is a careful and detailed example of an order which preserves the immediate interests of the employees in safety and of the employer in production, pending arbitration. Imposition of such a condition is merely the application of equitable principles, which *Boys Markets* preserves in strike injunction cases. As the Sixth Circuit explained, in reversing the denial of an injunction sought by a railroad against a mining company whose operations posed a potential danger to individuals using the railroad's right-of-way:

"If the threatened injury to the railroad right-of-way be envisioned merely as the sliding of some of the surface material of the mountain upon the railroad right-of-way necessitating some expense in its removal and in the repair of the roadbed, we might well say that recovery of damages in a suit at law provides adequate remedy. We have here, however, a railroad over which pass trains bearing passengers and freight. Their daily number is not disclosed by the record, and being but a branch line it may be assumed that the traffic is not heavy. Nevertheless, traffic there is, and the effect of a substantial mountain slide upon a passing train might well be catastrophic. It may be that such disaster could occur only upon a concatenation of circumstances of not too great probability, and that the odds are against it. It is common experience, however, that catastrophes occur at unexpected times and in unforeseen places. The pictorial exhibits graphically depict the steep face of the cliff behind which the pillars stand, and its proximity to the railway tracks, and it is indeed bold prophecy which denies the threatened danger. A

court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate." *Harris Stanley Coal and Land Co. v. Chesapeake & O. Ry. Co.*, 154 F.2d. 450, 453 (C.A. 6), emphasis added.

With these preliminaries, we now show that the District Court erred in enjoining the work stoppage in this case.

1. For a *Boys Markets* injunction to issue there must be a finding that "breaches are occurring and will continue, or have been threatened and will be committed"; i.e., in cases such as the instant one that there are "violations of [the union's] no-strike obligation." 398 U.S. at 254.

(a) Where, as in *Boys Markets*, the dispute is determined to be arbitrable and there is an explicit no-strike clause coextensive with the arbitration commitment, a strike called by the union is a breach of the agreement absent overriding special circumstances. Moreover, where a dispute is determined to be arbitrable, and the contract does not expressly reserve the union's right to self-help, a strike called by the union is also a breach of the agreement absent overriding special circumstances. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 106. But this Court has emphasized that neither *Lucas Flour* nor *Boys Markets* creates an independent legal obligation not to strike pending arbitration; that obligation exists only where it is "freely undertaken" as a matter of contract. See 398 U.S. at 252. Thus, the parties may, if they so desire, agree to preserve their right to utilize self-help concerning an arbitrable issue and pending arbitration.⁴

⁴ In the instant case it is the company that seeks judicial relief and the respondent unions that claim that they have not waived

In *Boys Markets*, the collective agreement made it manifest that the express no-strike commitment contained therein was coextensive with the scope of the arbitration clause. See 398 U.S. at 238-239, n. 3. The clerks union did not argue that its strike was lawful under the agreement; its sole contention was that though in breach of contract the strike was not enjoined under *Sinclair Rfg. Co. v. Atkinson*, 370 U.S. 195. In the instant case, however, the respondent unions do assert that they have a right to strike over this dispute. As we have already noted, their position is that §(e) of the provisions setting out the "Mine Safety Program" in their collective agreement provides for the settlement of this dispute by economic force and not by arbitration.⁵

their right of self-help and that no injunction requiring them to bend to the employer's will should issue. But the contract interpretation and equitable issues presented here also arise in cases instituted by unions and in which the employer claims that he has retained his right of self-help and that no injunction should run in favor of the union. See *Detroit News. Publ. Ass'n. v. Detroit Typo. Un. No. 18 Etc.*, 471 F.2d 872 (C.A. 6) cert. denied 41 L.W. 3591 (May 7, 1973); compare *Shore Line v. Transportation Union*, 396 U.S. 142. It is for this reason that we refer to the "parties'" right to retain the option⁶ of self-help and not solely to the "unions'" right to do so.

⁵ "The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee."

"If the safety committee in closing down an unsafe area

Even if this Court were to decide that the breadth of the clause entitled "Settlement of Local and District Disputes" (A. pp. 13a-14a) permits the conclusion that arbitration is in order here, there can be no doubt that §(e), taken against its background of the deletion of all no-strike commitments (see A. p. 14a), constitutes an express reservation of the right to strike where a local or its mine safety committee "believes an immediate danger exists." Any other interpretation of §(e) would read it out of the agreement. In other words, even if it is read narrowly, §(e) must be acknowledged to be an express reservation of the right to strike over safety issues while the grievance and arbitration procedures are running their course. And, as the Court of Appeals stated, the record establishes that the strike here comes within the scope of §(e):

"There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction. Indeed, they pleaded *nolo contendere* to a charge of criminal violation of safety requirements and were fined \$200 each. And there had been a few earlier complaints concerning their handling of matters involving safety." Pet. App. p. 14a.

The present situation is therefore governed by the fundamental proposition stated by Judge Hays in *Standard Food*

acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes." A. 12a.

Products v. Brandenburg, 436 F.2d 964, 965 (C.A. 2): "Where the union has not given up the right to strike, the Norris-LaGuardia Act prohibits the issuance of an injunction." To paraphrase the *Brandenburg* opinion: Since, as the court below found "the strike in the instant case was called [pursuant to §(e)] the injunction issued by the district court is not only unjustified, but is beyond the jurisdiction of the federal courts to grant. 29 U.S.C. §§101, 107 (1964)." *Ibid.*

(b) The burden of the preceding point is that §(e) of the "Mine Safety Program" Clause, read most restrictively, preserves (at least to the point where the arbitrator has issued his decision), the respondent unions' right to exert economic pressure to induce the employer to settle a safety dispute by meeting the miners' demands and that the District Court lacked jurisdiction to grant the portion of the injunction labeled "First." See pp. 12-14 *supra*. We now show that assuming *arguendo* that §(e) is not an express reservation of economic power, the Gateway employees had an elemental right of self-protection, recognized, both by the common law of collective agreements, and by §502 of the Act, which entitled the miners, who honestly and reasonably believed that the working conditions set by the Company endangered their life or limb, to refuse to work under those conditions without violating the collective agreement.⁶

⁶ It may be useful to spell out this distinction. Usually an abnormally unsafe condition jeopardizes only a single employee, or a small portion of the work force. Under the arbitration decisions to be discussed at pp. 17-19 *infra*, as well as under § 502, it is only the employees directly affected who are privileged to refuse to perform the work believed to be abnormally dangerous. Where a no-strike agreement is in effect, the other employees are not privileged,

(i) In *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, this Court unanimously refused to read a no-strike clause, all encompassing in its terms, to apply to an unfair labor practice strike. The Court reasoned that the union's undertaking "in light of the law relating to it when made," was a "natural adjunct of an operating policy aimed at

either under these arbitration decisions or under § 502, to make common cause with them. Put another way, this right exists solely for the employees' self-protection; it does not permit the use of economic power to compel the employer to abate the particular unsafe condition, or to be generally more responsive to the needs of the employees' health and safety.

In the present case, the respondent unions assert, with justification, that the present dispute was not encompassed by the no-strike clause, and that they were therefore permitted to use a work stoppage for offensive purposes. Putting that aside, the particular objection in this case was to the use of two foreman who had falsified records requiring by law to be kept for safety purposes. Contrary to the Company's argument, that is an issue which affected the safety of all employees: The retention of those foremen did not jeopardize only the miners who worked on the same shift; it is likely that a failure to comply with safety standards on one shift will affect the condition of the mine and therefore of all the employees.

Finally, it is appropriate to contrast two other related situations. In the leading § 502 case, *NLRB v. Knight-Morley Corp.* 251 F.2d 753 (C.A. 6), cert. denied 357 U.S. 927, some buffers believed in good faith that conditions in their work room were abnormally dangerous, and ceased work for that reason. That action was held to be protected. Knight-Morley's discharge of the employees despite their statutory protection was an unfair labor practice, and the cessation of work by other employees in response was therefore a protected unfair labor practice strike. Moreover, of course, in the absence of a no-strike commitment, a concerted stoppage over health or safety conditions is protected by § 7. See *Labor Board v. Washington Aluminum Corp.*, 370 U.S. 9.

avoiding interruptions of production prompted by efforts to change existing *economic* relationships," and that the "main function of arbitration under the contract is to provide a mechanism for avoiding *similar stoppages* due to disputes over the meaning and application of the various contractual provisions." *Id.* at 282-283, emphasis supplied.

It is also commonly understood that accomplishment of this objective does not require that pending arbitration over safety disputes the employees must perform work that that they reasonably believe to be abnormally hazardous to their safety and health.

Ordinarily when an employee is given an order by management, he must obey. If the employee believes that the order is in violation of his rights under the agreement, his recourse is the grievance procedure. If he refuses to comply with the order he is subject to discipline, even if it should ultimately be determined that the order was contrary to the agreement. *Cf. United States v. Mine Workers*, 330 U.S. 258. This is the general rule reflected in, and effectuated by the *Lucas Flour* and *Boys Markets* decisions. That rule, however, is subject to an important exception: An employee is not required to obey an order from management, if he would thereby violate public law, or if he believes that it would jeopardize his health or safety.

The leading statement of the general rule, and of the exception thereto, is that of the late Dean Shulman, who was the permanent umpire under the Ford Motor Company agreement:

"The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not

take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. But in the absence of such justifying factors, he may not refuse to obey merely because the order violates some right of his under the contract. The remedy under the contract for violation of right lies in the grievance procedure and only in the grievance procedure." *Ford Motor Co.*, 3 L.A. 779, 780.

This exception has been applied time and time again by arbitrators and is now accepted as "a truism in the common law of the shop." *Minnesota Mining and Mfg. Co.*, 59 L.A. 375, 378. For example, in *Laclede Gas Co.*, 39 L.A. 833, 839 the arbitrator stated:

"The principle applicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so. This is so well understood that the chairman does not believe that the general acceptance of this principle requires documentation."⁷

⁷ Another arbitrator has characterized *Laclede Gas* as "a partic-

In *Ford Motor Company*, Dean Shulman focused his attention on the basic rule, and explained why it was both essential and fair:

“[A]n industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. *It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.*” 3 L.A. at 781; emphasis supplied.

The foregoing also provides the principled justification for the exception for unusual health hazards recognized by Dean Shulman and developed by his successors. To borrow Dean Shulman's words, “the grievance procedure is [*not*] capable of adequately recompensing employees for abuse of authority by supervision” where that abuse requires action inconsistent, not with the employees' economic interest, but with their interest in continued health and

ularly apt expression of the principles involved *** synthesized from many other awards.” *A. M. Castle & Co.*, 41 L.A. 667, 670. And in *A. M. Castle* the arbitrator elaborated a point inherent in the *Lacle* Gas analysis but not explicated there:

“So long as [the employee] is sincere in his belief of danger, and so long as he makes a “reasonable” appraisal of the potential hazards, he is protected in his decision not to act, regardless of whether later on, in fact, it would be established that no hazard existed.” 41 L.A. at 671.

safety. Thus, fairness to the employees requires that the costs of delay during "exhaustion of the grievance procedure" be placed on the employer. Compare *Harris Stanley Coal*, 154 F.2d at 253, quoted at pp. 11-12 *supra*.⁸

But it is not enough for the protection of employees that the normal order of obedience followed by arbitration be reversed. For if they are ultimately subject to discipline for refusing to perform assigned work if the arbitrator should determine that it was not abnormally hazardous, the employees, who can rarely be certain of the fact of danger, would hesitate to assert their right not to endanger themselves. The industrial common law as developed in arbitration, relieves employees from this dilemma by framing the issue to be whether the employees had a "reasonable basis" for believing that carrying out the work assignment would endanger their safety and health, viewing the matter from their perspective and in light of the information available to them. See pp. 18-19 and n. 7 *supra*.⁹

⁸ The costs of delay can be reduced by providing an accelerated procedure for the arbitration of safety disputes, as in the contracts between the United Steelworkers and the major steel producers. See, e.g., §14c of the Agreement between United States Steel Corporation and the United Steelworkers of America, August 1, 1971, 1 BNA Collective Bargaining Negotiation & Contracts, 28.40.

⁹ Compare *Smith v. California*, 361 U.S. 147. There this Court held that in a prosecution for selling obscene books the state must prove that the defendant was aware of its contents, lest he restrict the books he sells to those he has inspected. Particularly in point for present purposes is this Court's approving quotation (*id.* at 153) of *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A.):

"Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."

(ii) The exception to the no-strike commitment for health and safety disputes articulated by Dean Shulman and refined by later arbitrators finds a statutory counterpart in §502, the "Savings Provision" of the Act, which states:

"nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Taft-Hartley's legislative history does not provide a gloss on the Act's language,¹⁰ and the Sixth Circuit, in the leading §502 decision, therefore gave the provision its natural reading:

"That section expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions. *** Since Section 502 provides that walking out under a good faith belief of abnormally dangerous conditions does not constitute a strike, the no-strike provision [in the agreement] was not applicable." *NLRB v. Knight-Morley Corp.*, 251 F.2d at 759.

So here, if employees could be punished for refusing work which was not abnormally unsafe, although they reasonably believed it to be, they would be penalized for their lack of "omniscience" regarding what are often complex technical or scientific problems beyond their ken.

¹⁰ The following are the sole references to §502 in the reports and debates which preceded the passage of the Act. Legislative History of the Labor-Management Relations Act of 1947 (G.P.O., 1948), pp. 29, 156, 290, 436, 573, 895. None of them explains its scope.

Thus, the Sixth Circuit's opinion in *Knight-Morley* parallels the law developed by the arbitrators as articulated in the *Laclede Gas* decision. The Court of Appeals stated that a no-strike commitment does not bar a walk-out "under a good faith belief of abnormally dangerous conditions." The arbitrator speaks of a right to refuse work where the employee "reasonably believes that by carrying out such work assignment he will endanger his safety or health." *Laclede Gas*, 39 L.A. at 839. This minor difference in terminology cannot, however, obscure the central point that both focus on an evaluation of the situation as it appeared to the employees at the time and provide that a refusal to work does not breach the no-strike obligation so long as the employees are actuated by honest and reasonable safety or health grounds for their refusal. To require more, for example, that the employees show, not simply that they acted reasonably and honestly, but that they were correct, viewing the matter in hindsight and in light of all of the facts as subsequently developed by experts in the field, would be to disregard the gravity of the stakes to the employees. See pp. 17-20 *supra*. Indeed, that construction would rewrite §502 in a manner which saves employees little of substance.

This is shown by the Eighth Circuit's decision in *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885, 892 (C.A. 8), which refused to follow *Knight-Morley*, and declared:

"[T]he effect of Section 502 in its application to the case at hand is that if employees acting concertedly leave their jobs believing in good faith abnormally dangerous working conditions prevail, they run the risk of discharge for engaging in a 'strike' in contra-

vention of a 'no-strike' clause in their collective bargaining agreement or for participating in the unprotected activity of dictating to management their own terms and conditions of employment, should proof later of the physical facts fail to support their prior belief."

We think that the same court's decision in *Hanna Mining*, 464 F.2d 565, eschewed this Draconian approach to the rights of industrial workers, and properly so. For it is plain that "no enlightened society" imposes on an employee such a Hobson's choice between a risk to his life or his livelihood. Cf. Pet. App. p. 17a.

The *Knight-Morley* test was followed by the Third Circuit in *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (C.A. 3), cert. denied 379 U.S. 833, and was approved by the majority below (Pet. App. p. 17a). Yet it was objected in dissent:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." Pet. App. p. 22a.

But this argument, which is adopted by the Company herein (Pet. Br. p. 39), disdains the teachings of experience. For, as we have shown above, the reading of §502 which we urge, is identical to that of the common law of the shop developed by arbitrators; the acceptance of that rule in "other industries" for many years, establishes that petitioner's fears of "chaos and unrest" (Pet. Br. p. 39) are wholly unjustified. More generally, "it has been sometime now since the law viewed itself as impotent to explore the actual state of

man's mind." *Smith v. California*, 361 U.S. at 154, and the authorities there cited.¹¹

As we have already noted, p. 14 *supra*, the majority in the court below found that the walk-out here was predicated on an honest belief that supervision by these foremen would unduly endanger the miners' lives. Pet. App. p. 14a. Plainly, deliberate falsification of safety records suffices to establish that the foremen's regard for the safety of the mine was less than that of "the ordinary men in the calling." *Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. 336, 339, quoting *Jones v. Lykes Bros. Steamship Co.*, 204 F.2d 815, 817 (C.A. 2, L. Hand, J.). As the *Boudoin* case illustrates, men as well as machines can render a working place unsafe. At best the hazards facing miners border on the "abnormally dangerous." Certainly the miners' insistence that the Company provide them with supervisors willing to abide by the minimal safety regulations imposed by law for their benefit was entirely reasonable. The report of the Pennsylvania Department of Environmental Resources relied on in the dissent below (Pet. App. p. 21a), does not justify a contrary conclusion. That agency did not decide that the foremen did not falsify records, nor that the employment of foremen who commit such violations does not increase the risks of working in the mines. See p. 6, n. 2 *supra*. The dissent's pleading point "that the union has never complained about the alleged past viola-

¹¹ The arbitration decisions cited at pp. 17-19 *supra*, which correctly insist that the employees' refusal to work on health and safety grounds must be reasonable (in light of the situation as it appeared at the time), demonstrate that the standard we propose here is not, as the Company would have it (Pet. Br. pp. 35-38), a purely subjective one.

tions" (Pet. App. p. 20a) by the same foremen, assumes that one deliberate falsification of safety records, in *this* industry, is not enough.

2. *Boys Markets* also prohibits the district courts from issuing a strike injunction unless the court finds that injunctive relief is appropriate under established equitable principles: the district judge can not go forward unless he determines that the breaches "have caused or will cause irreparable injury to the employer; and [that] the employer will suffer more from the denial of an injunction than will the union from its issuance." 398 U.S. at 254.

Adherence to these conditions is indispensable to fulfill the assurance of *Boys Markets*: "We do not undermine the vitality of the Norris-LaGuardia Act." *Id.* at 253. Rather, §7 of that Act remains fully applicable.¹² We are here particularly concerned with subsection (c):

¹² This has been understood by the lower courts. For example, in *Emery Air Freight Corporation v. Local Union 295*, 449 F.2d 586, 588 (C.A. 2), the Second Circuit said:

"We emphasized [in *New York Telephone Co. v. Communications Workers of America*, 445 F.2d 39 (C.A. 2)] that the Act still applies to all labor disputes in which a federal court can issue an injunction, that nothing in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), is to the contrary, and that although that decision allows an employer injunctive relief in a labor dispute, such relief is limited to vindicating the arbitration process. See Note, 71 *Colum.L.Rev.* 336, 342-44 (1971). [445 F.2d at 49] Thus, before an employer in a dispute with a union can obtain an injunction, there are a number of conditions to be satisfied. Section 7 of the Act, 29 U.S.C. §107, lists a good many of them."

And the Sixth Circuit held in *Detroit News. Pub. Ass'n.*, 471 F.2d at 875:

"The fact that this case involves an injunction against the employer does not mean that the District Court was free to

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, *** except after findings of fact by the court, to the effect"

. . .

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."

The purpose of that provision was clearly spelled out by Frankfurter and Greene:

"We have referred to the political difficulties confronting the federal judiciary through its interventions in industrial conflicts. Injunctions ought never to become routine. As the present Chief Justice [Taft] once observed:

"Government of the relations between capital and labor by injunction is a solecism. It is an absurdity. Injunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger."

No one can examine the record of litigation in the federal courts and continue to believe that the Chief Justice's warning has been heeded. The curb proposed in clause (c) is merely a paraphrase of the accepted doctrine of equity that issuance of a temporary injunction must rest upon a balance of convenience, but makes it explicit because experience has revealed the temptations to neglect this doctrine in labor controversies. Courts will thus have to consider more sharply, not merely the case for the complainant, but also the

ignore the procedural mandates set forth in §7 of the Norris-LaGuardia Act or to grant an injunction in the absence of irreparable harm."

union's stake in the controversy—its actual investment of time and money in the organization and conduct of the strike and, most important, the irretrievable damage to a strike and later reversal or modification of an injunction cannot ameliorate.”¹³

In the present case, the opinions of the District Court show on their face that the entry of the injunction was contrary to the requirements of §7(c) and *Boys Markets*. The issue is not discussed in the Memorandum and Order of June 28, granting the preliminary injunction; one must indulge the assumption that that memorandum incorporated by reference the following portion of the first paragraph of the Court's temporary restraining order issued on June 18:

“*** it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for work since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will cause irreparable harm not only to the plaintiff but to

¹³ F. Frankfurter and N. Greene, *The Labor Injunction*, pp. 221-222 (1930), footnotes omitted.

the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there." Pet. App. pp. 1a-2a.

It is evident on the face of the District Court's opinion that it ignored "the union's stake in the controversy" (Frankfurter and Greene, *supra*) and thus did not even begin to exercise its duty under *Boys Market* to weigh the respective equities of the parties. The Court's tacit assumption that the union loses nothing by being enjoined in a strike is two generations behind the times. That alone is sufficient to require reversal of the injunction against the work stoppage.

The condition "that the employer has suffered irreparable injury" has likewise not been met. The present case is in stark contrast to *Boys Markets*, where the employer was a grocery chain, with perishable products, and retail customers who could fulfill their everyday needs by patronizing the employer's competitors. Gateway's product, however, is coal, which has been in the ground for millions of years, and which would not lose in value by remaining there for the additional days, weeks, or even months of a strike;¹⁴ moreover, Gateway would lose no business, since its "customers" (R. 34)¹⁵ are, as Gateway's President testified, the three companies who jointly own it (R. 3, 30).

Thus, while the District Court stated "that the continued inactivity of the mine will cause irreparable harm *** to the

¹⁴ There was no showing that the market price of the coal would fall; that would in any event be an injury compensable by money damages.

¹⁵ "R." refers to the Appendix in the Court of Appeals, which is part of the record in this Court.

plaintiff" (Pet. App. p. 1a), it was unable to point to any injury to that "plaintiff," namely Gateway. The harm which the Court did find was to Jones & Laughlin Steel Corporation, a part owner and customer of Gateway, and to the general public. Pet. App. pp. 1a-2a. But neither Jones & Laughlin nor the general public is a "complainant" (Norris-LaGuardia Act, §7(c)) in this action, and respondent unions owe a contractual duty to neither. *Boys Markets* requires a finding of "irreparable injury to the employer" (398 U.S. at 254) not to others with whom he has an economic relationship. To be sure, a strike, or at least a successful one, inevitably inflicts some injury on third parties with whom the employer does business.¹⁶ But Congress has been quite specific in describing the circumstances under which a strike may be enjoined in the public interest, see §§206-210 of the Act, dealing with national emergency disputes; and it has declined to protect secondary employers against the "foreseeable disruptions" of a primary strike.¹⁷ Insistence upon the separate identity of Gateway on the one hand and its three corporate owners on the other, is there-

¹⁶ This is particularly true if the injury is deemed to be sufficient to warrant an injunction as long as it will occur "in due course." Pet. App. p. 1a. Here the testimony of Gateway's own witness was that it had 40 days' supply of coal on the ground at the time the strike began (R. 40) and thus over 20 days' supply at the time the temporary restraining order was entered. The strike could, therefore, have been permitted to continue for almost three weeks without injury to even Jones & Laughlin.

¹⁷ "Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected" *NLRB v. Operating Engineers*, 400 U.S. 297, 304.

fore not a technicality; it is essential to retain the vitality of the irreparable injury requirement in strike injunction cases.¹⁸

Thus, as in *Detroit News, Pub. Ass'n.*, 471 F.2d at 875, the injunction must be reversed because the District Court erred in evaluating the controlling equitable considerations.¹⁹

¹⁸ Indeed, when the shoe is on the other foot, neither the fact of part ownership, nor the supplier-customer relationship, would take Jones & Laughlin outside the protections of the secondary boycott provisions of the Act if the respondent unions had chosen to extend their disputes, for example, by striking not only Gateway but Jones & Laughlin as well.

¹⁹ In the *Detroit Newspaper* case a union had obtained an injunction prohibiting an employer from utilizing self-help pending arbitration where the collective agreement contained an explicit status quo provision (i.e., a provision limiting management in the same manner as an explicit no-strike clause limits labor). Since "[t]he Norris-LaGuardia Act was responsive to a situation *** [in which] the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions" (*Boys Markets*, 398 U.S. at 250), the irreparable injury requirement is entitled to no less rigorous adherence in strike injunction cases.

CONCLUSION

For the reasons stated in Respondents' Brief, and herein, the judgment below should be affirmed.

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July 23, 1973

Supreme Court of the United States

October Term, 1973

GATEWAY COAL COMPANY,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF FREDERICK McALLISTER, CLAUDE WORKE,
CARL ELLIS, JAMES RICH, JEROME SCOTT, WINFIELD
CREECH, GEORGE McHUGH, RONALD DEMCHYA, and
RONALD CASMIERSHI, TO APPEAR AMICI CURIAE ON
BEHALF OF RESPONDENT

and

BRIEF FOR FREDERICK McALLISTER, et al.,
IN SUPPORT OF MOTION TO APPEAR AMICI CURIAE
ON BEHALF OF RESPONDENT

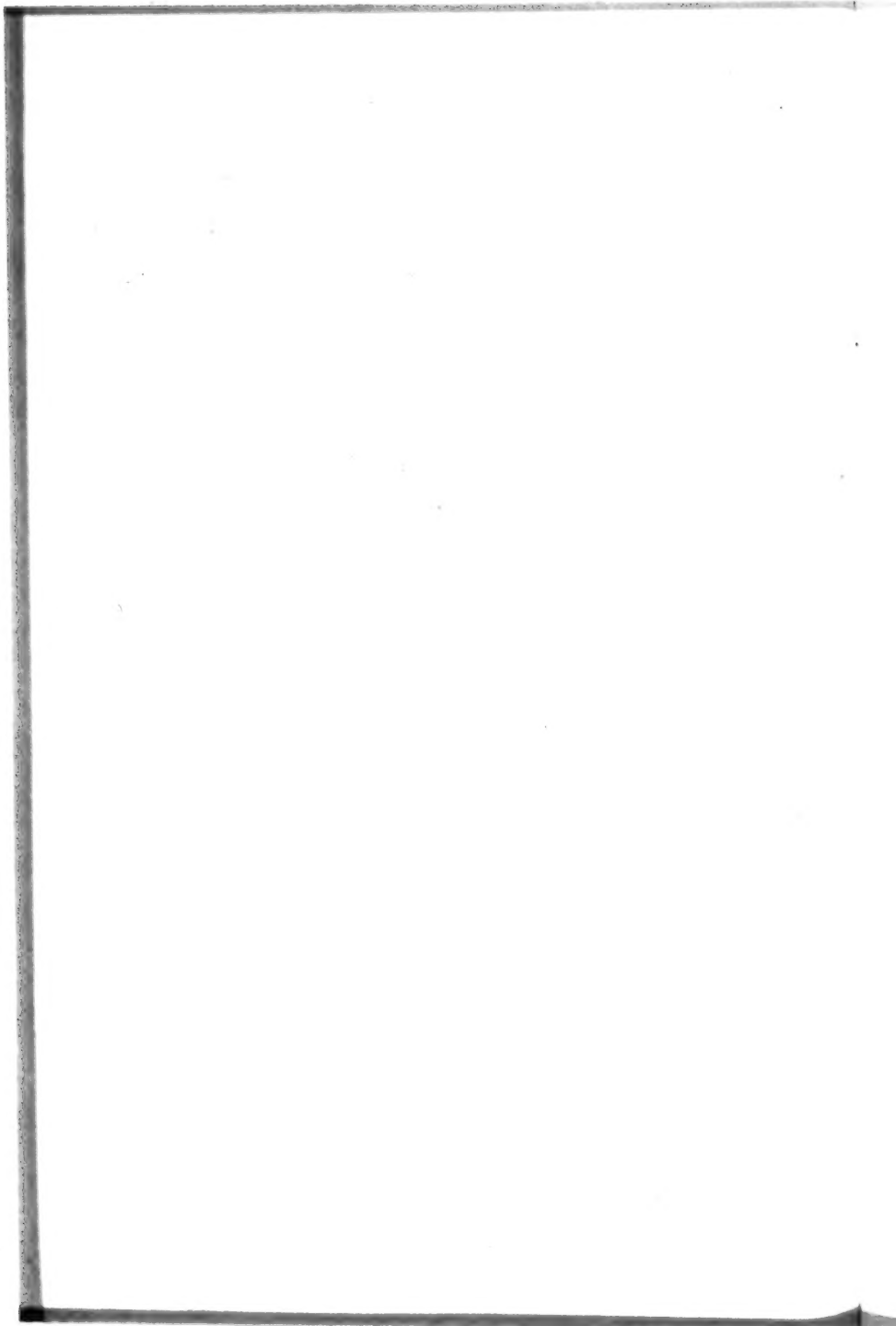
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Supreme Court of the United States

October Term, 1973

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v.

**UNITED MINE WORKERS OF AMERICA;
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RONALD CASMIERSHI, TO APPEAR AMICI CURIAE ON
BEHALF OF RESPONDENT**

Now come the above-named Petitioners and request leave to appear, *amici curiae*, on behalf of Respondents for the following reasons:

1. Petitioners are employees of the Chrysler Corporation at its Detroit Forge Plant.
2. Petitioners, as industrial workers, believe that they, and perhaps thousands of other workers, will be affected by this Honorable Court's decision herein.
3. Petitioners believe that there is room for individual workers to be heard before this Honorable Court.
4. Petitioners have recently been invidiously affected

by the misapplication of this Honorable Court's decision in *Boys Market v. Clerk's Union*, 398 U.S. 235 (1970), by the lower courts.

5. Petitioners file this motion belatedly because they have only recently, August 12, 1973, been adversely affected, as stated *supra*.

WHEREFORE, petitioners request that the leave applied for be granted.

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September 26, 1973

No. 72-782

Supreme Court of the United States

October Term, 1973

**GATEWAY COAL COMPANY,
Petitioner**

v.

**UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF FOR FREDERICK McALLISTER, et al,
IN SUPPORT OF MOTION TO APPEAR AMICI CURIAE
ON BEHALF OF RESPONDENT**

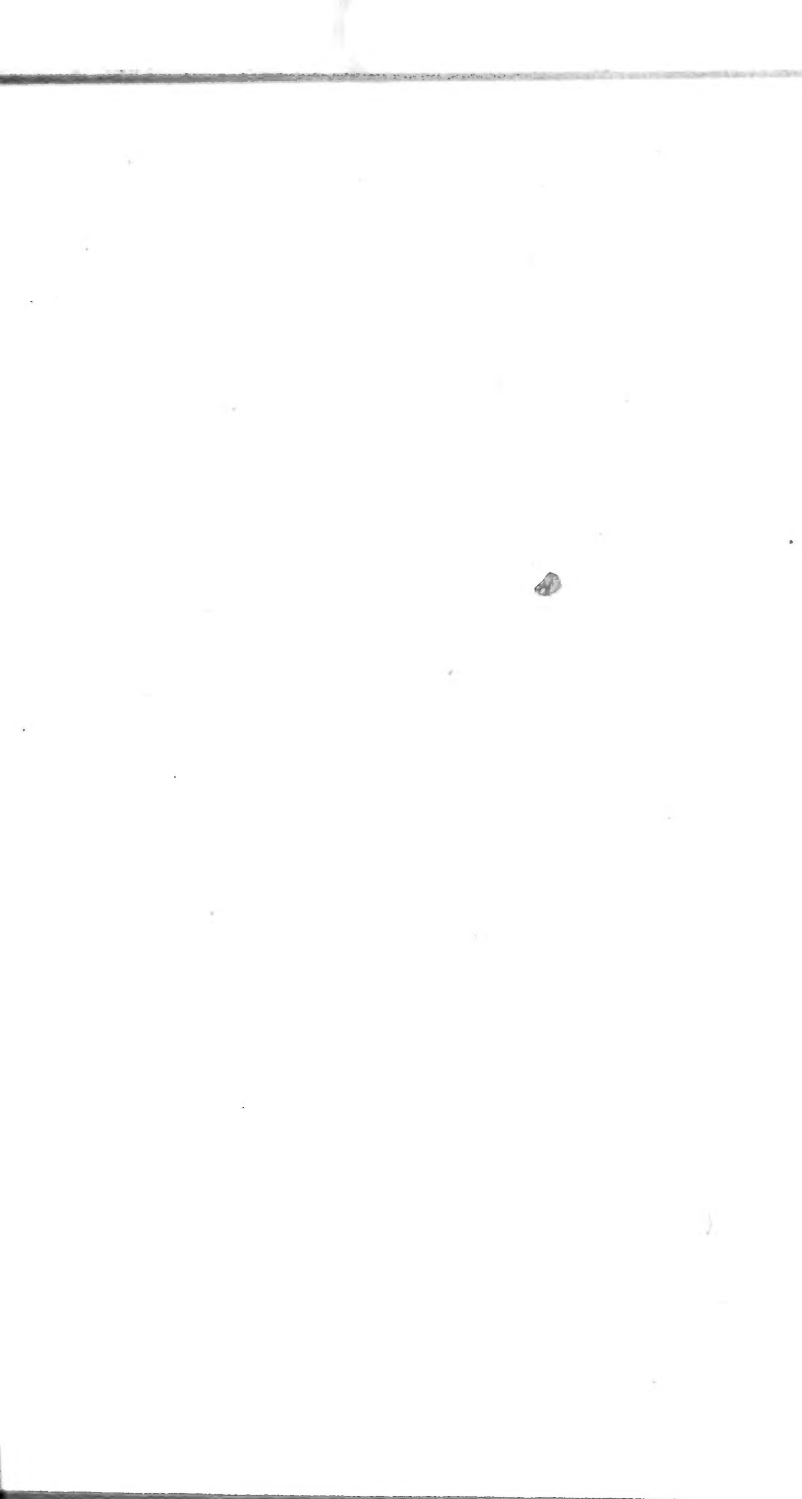


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STATEMENT OF INTEREST

Petitioners are employees of the Chrysler Corporation at Chrysler's Detroit Forge Plant. On August 7, 1973 they participated in a work stoppage at the Forge Plant protesting abnormally dangerous working conditions. During an inspection of the Forge Plant, Douglas Fraser, International Union Vice-President of UAW, called the Detroit Forge Plant one of the two most unsafe Forge Plants he had ever seen. Open wires, water leaks, greasy floors and machinery, and unsafe machinery were common place throughout the Detroit Forge Plant. Many of the petitioners had suffered severe, and often disabling, injuries prior to August 7, 1973.

The work stoppage which occurred on August 7, 1973, was precipitated by an injury to Antonio McJennett on August 5, 1973 at approximately 5:30 p.m. He lost two fingers on his right hand when a crane went out of control.

After the work stoppage on August 7, 1973 an injunction was issued by the Michigan Circuit Court on August 8, 1973, enjoining petitioners from refusing to work even though conditions in the plants were abnormally unsafe. The law suit was removed to the United States District Court for the Eastern District of Michigan, and a preliminary injunction was issued by the District Judge on August 12, 1973.

This preliminary injunction was based on *Boys Markets v. Clerk's Union*, 398 U.S. 235 (1970), and represents a severe inroad into the statutory scheme of the Labor Management Relations Act, Section 502, 29 U.S.C. 143.

Petitioners believe that they, and perhaps thousands of other workers, will be affected by this Honorable Court's decision in the present matter. They believe that the decision of the Court of Appeals in this case was correct. This

Honorable Court's decision in the *Boys Market* case is not applicable where workers withhold their services to protest "abnormally dangerous" conditions of work.

ARGUMENT

I. THE BOYS MARKET CASE IS NOT APPLICABLE TO THE GATEWAY SITUATION.

Amici curiae, as workers who withheld their service from the Chrysler Corporation because of good faith belief in abnormally dangerous working conditions, have felt the invidious effect of the misapplication of this Honorable Court's decision in *Boys Market v. Retail Clerks, supra*, by the lower courts.

The *Boys Market* doctrine, an exception to Section 4 of the Norris-La Guardia Act, 29 USC §104, is not applicable to the present situation. *Boys Market* is not applicable to §502 (29 USC 143) safety strikes. Under *Boys Market*,

"A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-La Guardia Act."

In order for the company herein to obtain an injunction, in the face of §4 of Norris-La Guardia, plaintiff must show:

1. That the labor dispute is covered by the no-strike clause, *and*
2. That the defendants are contractually bound to arbitrate the dispute in question.

These two elements are the necessary preconditions to the Court granting an injunction in this matter. *Boys Market, supra* at page 254; *Associated General Contractors v. Teamsters* (7th. Cir., 1972), 454 F. 2d. 1324, 79 LRRM 2555, at page 2558.

It is our contention that Plaintiffs as a matter of law and fact cannot prove either element in the instant case.

First, safety strikes under §502 of the Labor-Management Relations Act cannot, as a matter of law, be proscribed by no-strike clauses in collective bargaining agreements. The right to strike over "abnormally dangerous" working conditions cannot be bargained away because the right belongs to each worker and above the collective bargaining agreement.

The Court below recognized this fact and correctly found *Boys Market* inapplicable (see 466 F. 2d. 1157 Fn. 1):

"Men are not want to submit matters of life and death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life in his impartial decision. It should not be the policy of the law to force the employees to stake theirs in his judgment." (Emphasis added.)

Second, as the Court below noted, 80 LRRM at 3154, the contract herein "neither particularly stated nor unambiguously agreed" that the parties would submit mine safety disputes to arbitration, "and the practice of the parties had been to the contrary." Under *Boys Market*, no injunction may be issued unless the parties are contractually bound to arbitrate the dispute in question.

Thus, even assuming *per arguendo* that §502 does not apply, no injunction should issue herein under *Boys Market*. The condition precedent for injunctive relief, agreement to arbitrate, does not exist.

In *Boys Market*, this Honorable Court specifically said:

"We do not undermine the vitality of the Norris-La Guardia Act." (Emphasis added.)

Yet, application of *Boys Market* to the present situation, or to any situation involving a §502 strike, *does* undermine the vitality of the Norris-La Guardia Act.

Section 502 operates to remove strikes protesting abnormally dangerous working conditions from the ambit of contractual no-strike agreements, *as a matter of law*.

Under *Boys Market*, strike injunctions can only issue in:

"... the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure."

Otherwise, the Norris-La Guardia Act must be applied. Here, as in all §502 strikes, the issues are not mandatory arbitration issues, since they are outside of the no-strike prohibition. By applying *Boys Market* in these situations, the Norris-La Guardia Act is undermined.

II. A SAFETY STRIKE, PROTECTED BY SECTION 502 OF THE NLRA, IS OUTSIDE THE COVERAGE OF THE EMPLOYER'S NO-STRIKE PROVISION.

Section 502 reads:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the

place of employment of such employee or employees be deemed a strike under this Act."

This provision was interpreted to exclude any safety strike from the no-strike provision:

Moreover, it was not error for the Board to decide that under these circumstances it was immaterial that the bargaining contract contained a no-strike clause. Since Section 502 provides that walking out under a good faith belief of abnormally dangerous conditions does not constitute a strike, the no-strike provision was not applicable.

.

That section expressly limits the right of management to require continuance of work under what the employees in good faith believe to be "abnormally dangerous" conditions.

NLRB v. Knight Morley Corp., 251 F. 2d 752 (CA 6 1957) Cert. denied 357 US (1958)

Section 502 provides an absolute protection for a work stoppage protesting "abnormally dangerous conditions," such as the condition herein. As the Court of Appeals below said, a safety dispute is "*sui generis*". Under the very language of Section 502, such a work stoppage can never be construed to violate a contractual no-strike provision, since Section 502 states that such a work stoppage shall not be deemed "a strike under this Act".

Employees are protected under a "safety strike" even if they fail to first make a demand on the employer.

We cannot agree that employees necessarily lose their right to engage in concerted activities under Section 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.

NLRB v. Washington Aluminum Co., 370 U.S. 2 (1962)

In fact, in the *Washington Aluminum* case, the employees were protesting the cold conditions in the plant; this Honorable Court stated the actions were protected "whether they take place before, after, or at the same time such a demand is made."

The no-strike provisions of collective bargaining agreements cannot abrogate presently existing statutes and the protection employees are given under those statutes. The employer's interpretation has been specifically rejected.

The PMTA does not seriously challenge the Board's finding that the work stoppage was caused by an abnormally dangerous condition of work. See *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 41 LRRM 2242 C.A. 6, (1957), cert. denied, 357 U.S. 957, 42 LRRM 2307 (1958). The Association argues, however, that the lockout was justified because its purpose was to compel the union to abandon a "quickie strike," and to compel the submission of the dispute to arbitration. *The short answer to this is that because the union's activity was found to come within the ambit of §502, it was a strike in violation of the contract but on the contrary was protected activity.*"

Philadelphia Marine Trade Ass'n. v. NLRB, 330 F. 2d. 492 (CA 31964), 55 LRRM 2889 (emphasis added).

Without even referring to Section 502, or reaching a finding of "abnormally dangerous conditions", the Supreme Court in *Washington Aluminum* affirmed the employees' right to protest the cold under Section 7 of the Act. The Court emphasized the fact that it was,

"... (the) policy of the Act to protect the right of workers to act together to better their working conditions."

NLRB v. Washington Aluminum Co., 370 US 2 (1962), 50 LRRM 2237.

Section 502 provides additional or special protection for certain of those rights guaranteed by Section 7 of the Act. Under Section 7 employees have a right "to act together to better their working conditions". However, the Congress has said in Section 502 that where workers "act together to better . . . working conditions" which are "abnormally dangerous", they are given special protection. In short, the Congress has said in Section 502, that the right of workers to act together in "good faith" to better "abnormally dangerous conditions" cannot be bargained away by their collective bargaining agent. It is a right which is too basic to be bargained away.

CONCLUSION

For the reasons stated herein, petitioners seek to appear untimely as amici curiae on behalf of respondents, and request that this Honorable Court affirm the judgment below.

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September 26, 1973

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner,

v

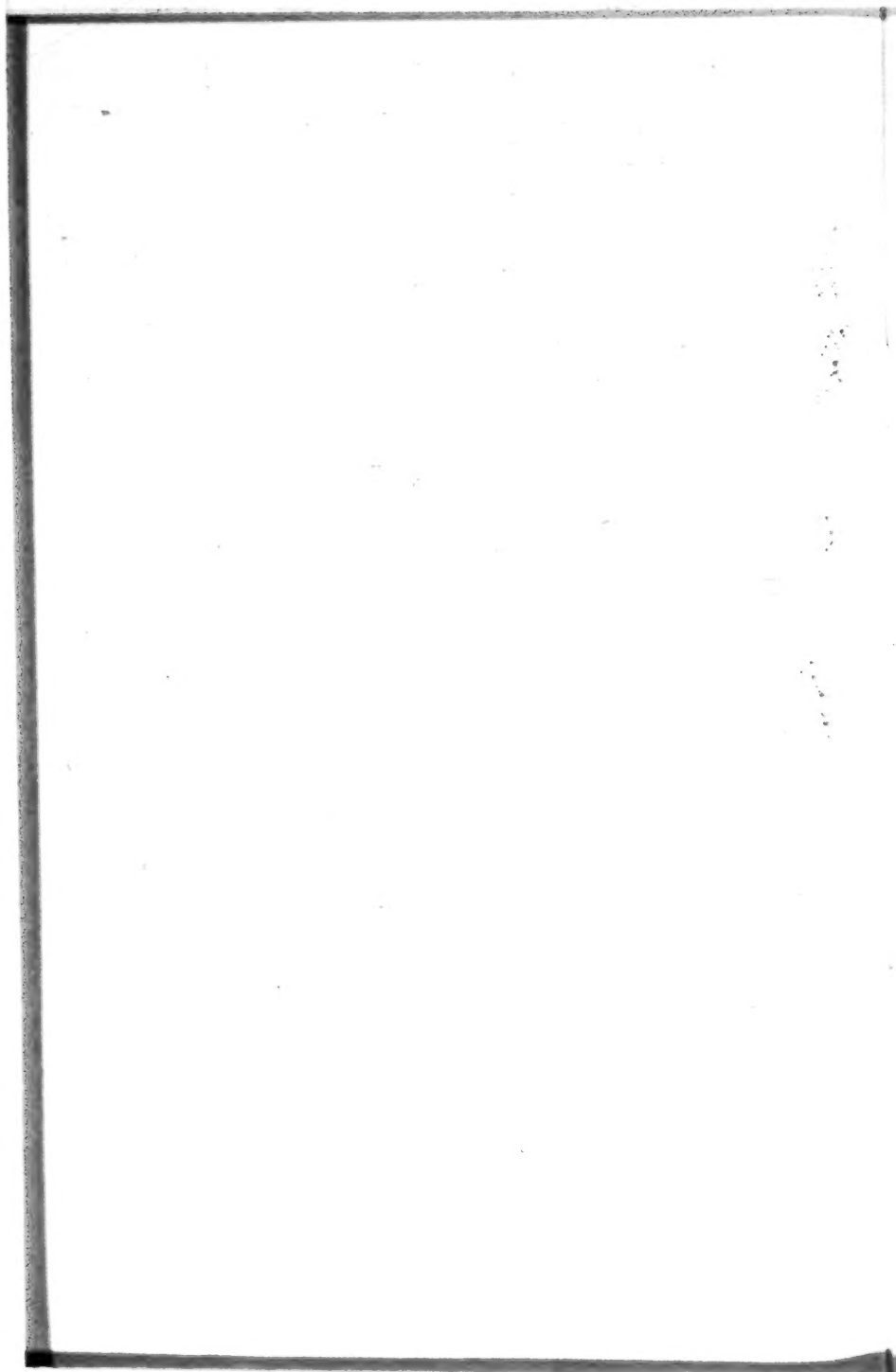
UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

Respondents' position in this appeal is based upon the following three fundamental misconceptions which they repeat in their brief in a variety of ways:

1. That the procedures of the Mine Safety Program provision of the National Bituminous Coal Wage Agreement of 1968 were followed and are therefore applicable to this case;
2. That the Mine Safety Program provision expressly conferred upon the Gateway miners the right to engage in a work stoppage over an alleged "safety dispute"; and
3. That, because of the Mine Safety Program provision, the Gateway miners were not required to submit any "safety dispute" to arbitration and therefore a strike allegedly over

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safety was not a violation of the labor agreement which the District Court could enjoin.

All of these propositions, which are essential to Respondents' case, are invalid as a matter of fact and of law.

I. The Procedures Of The Mine Safety Program Provision Were Never Followed And Therefore Are Not Applicable To This Case

The District Court found, on the basis of the evidence presented at the injunction hearing, that the procedures of the Mine Safety Program¹ of the labor agree-

1. The relevant portion of the Mine Safety Program provision is as follows:

"(e) Mine Safety Committee

"At each mine there shall be a mine safety committee selected by the local union. . . .

"The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

"If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions for settlement of disputes." (A. 12a)

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ment were never followed in connection with the dispute which gave rise to the work stoppage (App. B, p. 9a).

This finding is clearly supported by the record. No evidence was produced as to the number or identity of the members of the Gateway Mine Safety Committee nor was there any showing by the Union that the Mine Safety Committee ever made or reported findings to the Gateway management regarding the alleged safety dispute or that it recommended that the Gateway management remove "all mine workers from the unsafe area" as required by that provision. Similarly, there was no showing by the Union that the Mine Safety Committee believed that conditions found after an inspection endangered "the life and bodies of the mine workers" or that this Committee believed that an "immediate danger" existed such as would require removal of the miners from the unsafe area.² Instead, the Gateway Local simply took unilateral strike action and shut down the entire mine, both above and below ground and on all shifts, when the Company sought to return the foremen to work on June 1.

2. It is significant that there is no evidence that the Mine Safety Committee proposed the April 18, 1971 resolution that the members of the Gateway Local would not work with the foremen (R. 146, 154, 165-166). Of the four Gateway miners who testified at the injunction hearing, only one was a member of the Mine Safety Committee, and he did not testify as to any action taken by the Committee regarding the dispute over the foremen (R. 141-149). Although this Safety Committeeman attended the April 18 meeting, he did not propose the resolution and neither he nor any of the other three witnesses could say who had done so (R. 146, 154, 165-166).

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In their brief,³ Respondents seek to shrug off their failure to utilize the specific procedures of the Mine Safety Program by terming them "rigid formalities." However, it is obvious that, if the Respondents are to rely upon this provision, they must show that they followed its terms. Since the procedures of the Mine Safety Program were completely ignored, they cannot be used to justify, after-the-fact, an otherwise illegal walkout. Thus, the Mine Safety Program provision can have no application to this case, and Respondents' elaborate argument regarding its meaning and effect must fall of its own weight.

II. The Mine Safety Program Provision Does Not Expressly Confer On The Miners The Right To Stop Work Over Alleged Safety Disputes

Even if Respondents' failure to follow the procedures of the Mine Safety Program is ignored, there is a second misconception in Respondents' brief — that this provision "expressly confers on the miners the right to walkout in protest against unsafe conditions at the mine"⁴ and grants the miners an apparently unreviewable "right to act on their own views and apprehensions."⁵ This assertion is repeated many times in a number of different forms in Respondents' brief, apparently on the theory that if it is stated enough times, it will be accepted as correct.

Contrary to Respondents' contention, the Mine Safety Program does not expressly or by necessary im-

3. Respondents' Brief, p. 30, n. 53.

4. Respondents' Brief, p. 11.

5. Respondents' Brief, p. 32.

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plication confer upon *the miners* the right to engage in work stoppages over alleged safety disputes. The provision gives the Mine Safety Committee, as distinguished from the miners themselves, certain specific, limited powers, including the right to inspect "any mine development" and the authority to "report its findings and recommendation to the management" if it believes that conditions found endanger the life and bodies of the mine workers. (A. 12a).

Under the terms of the Mine Safety Program, even the Mine Safety Committee has no authority to call a strike over a safety dispute. Its sole power "[i]n those special instances where the committee believes an immediate danger exists" is to recommend that "management remove all mine workers from the unsafe area." If it makes such a recommendation, then "the operator is required to follow the recommendation of the committee." (A. 12a).

This is totally different from Respondents' claim that the Mine Safety Program provision authorized 200 out of the 550 miners employed at the Gateway mine to take legal strike action over the dispute concerning the foremen by voting at the April 18 membership meeting not to work with them. There is nothing in the language of the provision which suggests that the general union membership has a right to usurp the function and authority of the Mine Safety Committee, which is supposed to have knowledge superior to that of the rest of the Local Union membership as to safety matters because of its greater experience in dealing with safety problems. Moreover, since the Mine Safety Program merely gives the Safety Committee the right to recommend the closing of the unsafe area, the provision

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clearly contemplates discussions between the mine management and the Committee before the operator accedes to the recommendation. Otherwise, the provision would have granted the Safety Committee the specific power to remove the miners from the unsafe area. Finally, the mere fact that the Local Union elects the Mine Safety Committee does not mean that the membership can take matters out of the Committee's hands and act according to its own notions of what constitutes an "immediate danger."

Thus, Respondents' contention that the labor agreement expressly conferred upon the Gateway miners the right to engage in a general walkout over safety is negated by the wording and the sense of the Mine Safety Program provision.⁶

III. Respondents' Duty To Arbitrate The Dispute Over The Foremen Was Not Affected By The Mine Safety Program Provision And The Work Stoppage Was Therefore Illegal and Enjoinable

As we pointed out in our main brief, the National Bituminous Coal Wage Agreement of 1968 contains in the "Settlement of Local and District Disputes" provision a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final and

6. The record shows that when the International Union was notified as to the June 1 work stoppage it advised Gateway that "pursuant to the policy of the organization relative to unauthorized work stoppages, the officers of the district involved have been advised to exercise every effort to have the men involved return to work" (Pl. Ex. 4; R. 214). Such conduct is clearly inconsistent with Respondents' present claim that the Gateway miners had a legal right to strike.

binding arbitration of "differences . . . between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and "differences . . . about matters not specifically mentioned in [the] agreement . . ." and ". . . any local trouble of any kind [arising] at the mine . . ." (A. 13a-14a).⁷

The labor agreement also provides in Section 3 of the "Miscellaneous" provision that the parties

" . . . agree and affirm . . . that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (A. 15a)

Thus, under Section 3 of the Miscellaneous provision, the only type of dispute which is excluded from arbitration is one which is "national in character."⁸ Neither

7. Even if, as Respondents assert at page 10 and 23 of their brief, the arbitration clause "is both general and vague" and does not specifically refer to safety disputes, this would have no bearing on Respondents' duty to arbitrate since "[d]oubts should be resolved in favor of coverage.": *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960).

8. Respondents do not contend that the dispute at the Gateway Mine over the foremen is "national in character." Consequently, this exception has no application here.

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Miscellaneous, Section 3 nor any other provision of the labor agreement expressly exempts the Union from the duty to submit alleged safety disputes such as the one concerning the Gateway foremen to arbitration under the Settlement of Local and District Disputes provision of the agreement.⁹

Notwithstanding this fact, Respondents assert that because, in their view, the Mine Safety Program provision "states plainly that the miners may make their own determination with respect to the safety of the mine and may act on that determination,"¹⁰ they need not arbitrate any safety disputes.

To buttress their contention, Respondents rely upon what they claim is the bargaining history of the Mine Safety Program provision.¹¹ However, the evidence of

9. *Standard Food Products Corp. v. Brandenburg*, 436 F.2d. 964 (2nd Cir. 1970), cited by Respondents at page 39 of their brief, is distinguishable on this basis. There, the labor agreement specifically excepted from the requirement of arbitration certain types of contract violations and expressly provided that, as to such violations, the Union was free to strike.

10. Respondents' Brief, p. 24. As we have already shown in Part II of this Reply Brief, Respondents' contention is contrary to the plain language and sense of the Mine Safety Program provision.

11. This evidence of bargaining history consisted of references to Union-prepared minutes of the 1946 National Bituminous Coal Wage Conference (Respondents' Brief, p. 14, n. 19), the Senate and House hearings concerning the Centralia Mine disaster where the Krug-Lewis agreement of May 29, 1946, to which the coal operators were not parties, was discussed, and to agreements between the coal operators and the United Mine Workers earlier and later than the Krug-Lewis agreement, which are not in the record.

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bargaining history in Respondents' Brief is not a matter of record and was not raised below. On this basis alone, it should not be considered. Moreover, even if such evidence had been proffered at the trial of this case (which it was not), it would have been rejected by the District Court since, as we have shown, the exclusionary clause in the agreement, Miscellaneous, Section 3, does not remove safety disputes from the jurisdiction of the arbitrator.

In *Steelworkers v. Warriors & Gulf Co.*, 363 U.S. 574 (1960) as the dissenting opinion makes clear, the majority of the Court refused to consider evidence concerning the bargaining history of the Union's unsuccessful efforts to obtain a subcontracting clause in determining whether an exclusionary clause prevented arbitration of a subcontracting grievance. Similarly, where, as here, "the union's claim that the parties did not agree to arbitrate a particular dispute (normally a question for the court) depend[s] on proof of bargaining history (normally requiring an evidentiary hearing), resolution of the question must be left to the arbitrator.": *Tobacco Wkrs. Int. U. Local 317 v. Lorillard Corporation*, 448 F.2d 949, 958 (4th Cir. 1971); *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 283 F.2d 93 (3rd Cir. 1960); *International U. of Elec., R. & M. Wkrs. v. General Elec. Co.*, 332 F.2d 485 (2nd Cir. 1964), cert. den., 379 U.S. 928 (1964); *Linton's Lunch v. Restaurant Guild Chain Local #138*, 233 F. Supp. 112 (E.D. Pa. 1964).

In the present case, the impartial umpire who heard the dispute regarding the foremen rejected the Union's claim that the Mine Safety Program provision rendered

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the dispute non-arbitrable (App. G, 43a-47a).¹² Thus, Respondents' position as to the effect of the Mine Safety Program on the arbitrability of the dispute has been determined adversely to their position on this appeal by the umpire, whose decision on this question is "final" under the arbitration clause because it involves the "meaning and application of the provisions of [the] agreement" (A. 13a-14a): *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

Since the dispute over the foremen was arbitrable, it plainly follows that the June 1 work stoppage violated the labor agreement, even though the agreement does not contain an express no-strike clause: *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104-105 (1962).¹³

12. Contrary to Respondents' assertion at page 32, n. 57 of their brief, the Court of Appeals did not order the umpire's award stricken because the Court agreed with Respondents' interpretation of the Mine Safety Program provision but because the award was issued after the record had been transmitted to the Court of Appeals. However, the Court of Appeals refused Respondents' further request to strike Gateway's brief, which contained numerous references to the award, and the subsequent opinion of the Court of Appeals contains a detailed discussion of the award, thereby indicating that, upon further reflection, the Court considered the award to be material to a proper disposition of this case. In the related case of *United States Steel Corporation v. Mine Workers*, No. 72-930 October Term 1972 (petition for certiorari pending), the record does include the umpire's award, which was issued before the record was transmitted to the Court of Appeals.

13. Respondents' contention, at page 10, n. 10 of their brief, that the *Lucas Flour* doctrine should not be carried over into *Boys Markets* setting ignores the fact the very same policy considerations which prompted the court to imply a no-strike clause with regard to arbi-

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Respondents' further contention — that a no-strike clause should not be implied because of Section 1 of the "Miscellaneous" provision of the agreement¹⁴ — is equally without merit.

In *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958) the Court of Appeals was faced with exactly the same argument as that presented here, that the right to strike was preserved in the agreement between the mine operators and the United Mine Workers. There, as here, the union asserted that language in the 1950 agreement identical to that found in Section 1 of the "Miscellaneous" provision of the 1968 agreement permitted the union to strike over any dispute, including those subject to resolution under the "Settlement of Local and District Disputes" procedure, which was, in all material respects, identical to the comparable provision of the 1968 agreement. The Court of Appeals rejected this contention. It concluded that, because of language of the 1950 agreement similar to that contained in Section 3 of the "Miscellaneous" provision,¹⁵

trable disputes in *Lucas Flour* formed the primary basis for the *Boys Markets* decision, and, in fact, this Court cited *Lucas Flour* with approval in *Boys Markets* (398 U.S. at 248, n. 16).

14. Section 1 of the "Miscellaneous" provision provides:

"1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." (A. 14a)

15. Section 3 of the "Miscellaneous" provision is quoted in n. 1 of this Reply Brief.

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a strike over a dispute which was subject to resolution under the "Settlement of Local and District Disputes" provision constituted a violation of the agreement. The Court went on to state at page 351:

"This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement . . ."

Significantly, by the time the case was argued before the Court of Appeals, the provision making resort to the "Settlement of Local and District Disputes" procedure obligatory had been revised in the 1952 agreement to wording which is identical to that of Section 3 of the "Miscellaneous" provision of the 1968 agreement.¹⁶ The court noted this difference in language, but concluded that "the obligation to resort to the specified procedure was not substantially changed" (259 F.2d at p. 350).

Although *Lewis v. Benedict Coal Corporation* was affirmed by an equally divided Supreme Court at 361 U.S. 459 (1960), the holding of the Sixth Circuit — that a strike over a dispute subject to resolution under the grievance-arbitration procedure violates the labor agreement even in the absence of an express no-strike clause — became the basis for the decision of this Court

16. The wording of the provision in the 1952 agreement is set forth in 259 F.2d at page 350, n. 5. It is identical to Section 3 of the "Miscellaneous" provision of the 1968 agreement (A. 12a).

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two years later in *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and has been the law ever since.¹⁷

There is no long-simmering conflict among the circuits on this issue as Respondents suggest at page 10, n. 10 of their brief. The "separate opinion of Judge McLaughlin" in *Bethlehem Mines Corp. v. UMWA* (C.A. 3, No. 72-1466, April 6, 1973) which they claim "adopts respondents' position" is, in reality, a dissenting opinion to a per curiam opinion by the Third Circuit — hardly authority for their position.

For these reasons, the District Court properly determined that the case was appropriate for the entry of injunctive relief under *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970) and ordered arbitration of the underlying dispute. The District Court did not find, as Respondents contend at page 29 of their brief, that the work stoppage "was motivated by the miners good faith apprehensions concerning the safety of the mine."¹⁸

17. Petitioner's Brief, p. 30. See, in addition, *Peabody Coal Mine v. Local 7869, UMW*, F. Supp., 83 LRRM 2868 (W.D. Ark. 1973).

18. In this connection, while Respondents contend that the miners feared that the continued presence of the foremen in the mine would constitute a safety hazard in view of one instance of an alleged failure to record the proper air volume in their log books, at the injunction hearing, Respondents stated that they had no objection to the return of the foremen to the mine as members of the bargaining unit (R. 181). Obviously, if the foremen were unsafe in the mine as supervisors, they would be unsafe as hourly employees, since hourly employees have many safety duties to perform as part of their normal work.

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The District Court merely stated that "[t]he local union contends that a safety dispute exists." (App. B., p. 7a). Their further assertion at page 32, n. 56, that "[t]he arbitrator never doubted that the miners had made a good faith determination with regard to the safety of the mine" is equally incorrect. In his award, the impartial umpire specifically held that the position of the Gateway employees in refusing to work with the foremen was unfounded. (App. G., p. 51a).

*Conclusion.***CONCLUSION**

For the reasons stated herein as well as those in our main brief, the judgment of the Court of Appeals for the Third Circuit should be reversed.

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October 9, 1973

**GATEWAY COAL CO. v. UNITED MINE WORKERS
OF AMERICA ET AL.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

No. 72-782. Argued October 15, 1973—Decided January 8, 1974

Certain foremen at petitioner company's coal mine were suspended for falsifying records to show no reduction in airflow at the mine when in fact the airflow had been substantially reduced because of the collapse of a ventilation structure. When the company reinstated the foremen while criminal charges were pending against them, the miners, who are represented by respondent union, struck to protest the alleged safety hazard created by retention of the foremen. The union refused the company's offer to arbitrate. The company then brought this action under § 301 of the Labor Management Relations Act, contending that the broad arbitration clause of the collective-bargaining agreement governed the dispute. The District Court issued a preliminary injunction requiring the union to end the strike and submit to arbitration, and ordered suspension of the two foremen pending the arbitral decision. The Court of Appeals reversed and vacated the injunction, holding that there was a public policy disfavoring compulsory arbitration of safety disputes and that, absent an express provision of the collective-bargaining agreement, the union had no contractual duty to submit the controversy to arbitration and hence no implied obligation not to strike. *Held*:

1. The arbitration clause of the collective-bargaining agreement covering, *inter alia*, "any local trouble of any kind aris[ing] at the mine," is sufficiently broad to encompass the instant dispute, the foremen's continued presence in the mine being plainly a local issue. Pp. 374-380.

(a) On its face such contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire. P. 376.

(b) The "presumption of arbitrability" (an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and doubts should be resolved in favor of coverage), *Steelworkers v. American*

Mfg. Co., 363 U. S. 564; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, applies to safety disputes. Pp. 377-380.

2. The duty to arbitrate imposed by the collective-bargaining agreement gave rise to an implied no-strike obligation supporting issuance of an injunction against a work stoppage since, in the absence of an explicit expression negating any implied no-strike obligation, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application. Pp. 380-384.

3. On the facts, § 502 of the Labor Management Relations Act providing that the quitting of labor by employees in good faith because of abnormally dangerous conditions work shall not be deemed a strike, did not deprive the District Court of authority to enforce the no-strike obligation, the suspension of the foremen pending a final arbitral decision having eliminated any safety issue. Pp. 385-387.

4. The circumstances of this case satisfy the traditional equitable considerations controlling the availability of injunctive relief, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235, the District Court finding that the union's continued breach of its no-strike obligation would irreparably harm the petitioner, and eliminating any safety issue by suspending the foremen pending a final arbitral decision. P. 387.

466 F. 2d 1157, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 388.

Leonard L. Scheinholtz argued the cause for petitioner. With him on the briefs were *Henry J. Wallace, Jr.*, and *Daniel R. Minnick*.

Joseph A. Yablonski argued the cause for respondents. With him on the brief were *Clarice R. Feldman* and *Daniel B. Edelman*.*

*Briefs of *amici curiae* urging reversal were filed by *Milton A. Smith* and *Lawrence M. Cohen* for the Chamber of Commerce of the United States; by *Guy Farmer* for the Bituminous Coal Oper-

company acquiesced in this demand, and the following Monday the miners returned to work. Criminal prosecutions were instituted against the three foremen, and the Pennsylvania Department of Environmental Resources undertook consideration of possible decertification proceedings against them.

On May 29, while the criminal charges were still pending, the company received word from the Department that it was at liberty to return the three foremen to work if it so desired.³ One of the three had retired during his suspension, but the company reinstated the other two and scheduled them to resume work on the midnight shift on June 1. On that date, miners on all three shifts struck to protest the alleged safety hazard created by the presence of the two foremen in the mines. On June 8, the company formally offered to arbitrate this dispute, but the union refused. Subsequently, the two foremen pleaded *nolo contendere* to the criminal charges for falsification of the records and paid fines of \$200 each.

Faced with a continuing strike and a refusal to arbitrate, the company invoked the jurisdiction of the District Court under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185. It argued that the broad arbitration clause of the collective-bargaining agreement governed this dispute and requested an injunction against continuance of the strike. In a temporary restraining order later converted into a preliminary injunction, the District Court required the union to end the strike and to submit the dispute to an

³ After its investigation, the Department concluded that:

"In view of the satisfactory record and good performance of these foreman [*sic*] in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal company is at liberty to return the three (3) assistant foreman [*sic*] to work if it so desires." App. 16a-17a.

impartial umpire without delay.⁴ The order further provided for suspension of the two foremen pending the umpire's decision and prospectively required both parties to abide by his resolution of the controversy.

On appeal, the Third Circuit Court of Appeals, with one judge dissenting, reversed the judgment of the District Court and vacated the preliminary injunction.⁵ 466 F. 2d 1157 (1972). The court intimated that a special provision of the collective-bargaining agreement involved here might be construed to remove safety disputes from the coverage of the general arbitration clause and reasoned that, in any event, the usual federal policy favoring arbitration of labor relations disputes did not apply to questions concerning safety. *Id.*, at 1159-1160. Relying in part on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, the court found that there was a public policy disfavoring compulsory arbitration of safety disputes. Since it was "neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration," the Court of Appeals concluded that the union had no contractual duty to submit this controversy to arbitration and hence no implied obligation not to strike. 466 F. 2d, at 1159. Perceiving no wrong to enjoin, the court found it unnecessary to consider whether injunctive relief in this case was appropriate under the traditional considerations of equity set forth by this Court in *Boys Markets, Inc. v.*

⁴ The District Court found that the present work stoppage was occasioned by a safety dispute over the reinstatement of the suspended foremen rather than by an economic dispute over reporting pay for April 15.

⁵ While the appeal was pending and prior to the Court of Appeals' decision, the impartial umpire rendered his decision in favor of the company and determined, *inter alia*, that the two foremen should be permitted to return to work. 466 F. 2d 1157, 1159.

affirm . . . that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section" It excepts from the arbitration obligation only those disputes "national in character."

This arbitration provision appears sufficiently broad to encompass the instant dispute. The contractual obligation reaches "any local trouble of any kind aris[ing] at the mine," and the continued presence in Gateway Mine of two particular foremen is plainly a local issue. On its face, this contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire.

The Court of Appeals avoided this conclusion by reference to an assumed public policy disfavoring arbitration of safety disputes. The majority of that court recognized that the usual federal policy encourages arbitration of labor disputes but reasoned that this presumption of arbitrability applies only to disagreements over "wages, hours, seniority, vacations and other economic matters." 466 F. 2d, at 1159. The court thought that safety disputes should be treated as *sui generis*, and concluded that it should "reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration." * *Id.*, at 1160. We disagree.

* In finding a public policy disfavoring arbitration of safety disputes, the court reasoned as follows:

"Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to

The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203 (d) of the Labor Management Relations Act, 29 U. S. C. § 173 (d), states in part:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In the *Steelworkers Trilogy*,⁹ this Court enunciated the now well-known presumption of arbitrability for labor disputes:

"An order to arbitrate the particular grievance should not be denied unless it may be said with posi-

that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." 466 F. 2d, at 1160.

We find this analysis unpersuasive for the reasons stated in this section of our opinion.

The Court of Appeals also relied on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143. Section 502 provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work" shall not "be deemed a strike under this chapter." On its face, this section appears to bear more directly on the scope of the no-strike obligation than on the arbitrability of safety disputes. Indeed, there is nothing in the legislative history to suggest that § 502 was intended as a limit on arbitration. See 1 Legislative History of the Labor Management Relations Act, 1947, pp. 29, 156, 290, 436, 573, 895 (G. P. O. 1948). For this reason, we reserve our discussion of § 502 until Part III of this opinion. To the extent that § 502 might be relevant to the issue of arbitrability, we find that the considerations favoring arbitrability outweigh the ambiguous import of that section in the present context.

⁹ *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

tive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583 (1960).

The Court also elaborated the basis for this policy. It noted that commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter "arbitration is the substitute for industrial strife." *Id.*, at 578. A collective-bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts:

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment

whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs." *Id.*, at 581-582.

We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent.

The Court of Appeals majority feared that an arbitrator might be too grudging in his appreciation of the workers' interest in their own safety. We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust. We also disagree with the implicit assumption that the alternative to arbitration holds greater promise for the protection of employees. Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than on an informed and impartial assessment of the facts.

We therefore conclude that the "presumption of arbitrability" announced in the *Steelworkers Trilogy* applies to safety disputes, and that the dispute in the instant

case is covered by the arbitration clause in the parties' collective-bargaining agreement.¹⁰

III

The second question is whether the District Court had authority to enjoin the work stoppage. The answer depends on whether the union was under a contractual duty not to strike. In *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235 (1970), the Court considered the proper accommodation between the literal terms of § 4 of the Norris-LaGuardia Act¹¹ and the subsequently

¹⁰ The Court of Appeals also found support for its refusal to order arbitration in § (e) of the collective-bargaining agreement. Section (e) provides for an employee mine safety committee empowered to inspect mine facilities and equipment and to report its findings to the management. If the committee finds an "immediate danger," it may make a binding recommendation to remove all workers from the unsafe area.

Although the Court of Appeals did not state that § (e) was an express exception to the arbitration clause, it evidently believed that the section created an ambiguity in the agreement which had to be resolved against arbitrability. However, as the Court stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*, "[d]oubts should be resolved in favor of coverage." 363 U.S., at 583. Thus, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *Id.*, at 584-585. Since § (e) clearly does not constitute an express exception to the arbitration clause, it follows that the safety dispute in the instant case must be deemed to fall within the broad arbitration clause.

The dissent maintains that the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, pre-empts the field and "displace[s] all agreements to arbitrate safety conditions." *Post*, at 394. Respondents have not made this contention, and a fair reading of the Act discloses no congressional intention, either express or implied, to accomplish such a drastic result.

¹¹ "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any

enacted provisions of § 301 (a) of the Labor Management Relations Act.¹² The Court noted the shift in congressional emphasis "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." 398 U. S., at 251. It concluded that § 301 (a) empowers a federal court to enjoin violations of a contractual duty not to strike.

Although the collective-bargaining agreement in *Boys Markets* contained an express no-strike clause,¹³ injunctive relief also may be granted on the basis of an implied undertaking not to strike. In *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95 (1962), the Court held that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.¹⁴ Indeed, the

case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment" 47 Stat. 70, 29 U. S. C. § 104.

¹² "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U. S. C. § 185 (a).

¹³ 398 U. S., at 239 n. 3.

¹⁴ *Lucas Flour* involved a damages action for breach of the implied no-strike obligation, while the present case involves injunctive relief. The policy reasons favoring the availability of injunctive relief, however, are equally compelling. As the Court stated in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235, 248 (1970):

"[A]n award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would

strong federal policy favoring arbitration of labor disputes was the linchpin of this Court's reasoning in *Boys Markets*. Denial of all equitable relief for breaches of no-strike obligations would have carried "devastating implications for the enforceability of arbitration agreements." 398 U. S., at 247. As MR. JUSTICE BRENNAN stated for the Court in that case:

"[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. . . . Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." *Id.*, at 248. (Citation omitted.)

Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets*. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.

In the present case, the Court of Appeals identified two provisions which it thought excepted safety disputes from the general no-strike obligation. The first is § (e) of the collective-bargaining agreement, which provides for a union mine safety committee at each mine. As

only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union."

this section was thought central to the outcome of this case, we set forth the relevant provisions in full:

"The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life [*sic*] and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

"If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes." App. 12a.

The union contends that this provision reserves to the workers the right to strike over safety disputes and also that the committee's determination of "immediate danger" may be wholly subjective and without foundation in fact. In short, the safety committee may object to any aspect of mine operation as an "immediate danger" and call the workers off the job to force whatever changes it proposes. The union further argues that since the exercise of this option cannot constitute a breach of the collective-bargaining agreement, the District Court had no wrong to enjoin.

We need not decide whether § (e) is subject to such an expansive reading, for, as the District Court found, that section was never invoked in this controversy. The safety committee did inspect the mine to determine the

cause of the ventilation failure, but there was no showing that it ever reported findings or made recommendations to the company management. Nor was there any showing that the committee found conditions dangerous to the "life [*sic*] and bodies of the mine workers" or which, if any, of its members formed the requisite belief in the existence of "an immediate danger."

The Court of Appeals majority apparently believed that the vote by the local membership, the body superior to the union safety committee, constituted substantial compliance with the purpose and intent of § (e) and obviated any need for compliance with the formal procedure. As a matter of simple contractual interpretation, we think that proposition doubtful. Under the union's construction of § (e), the committee's good-faith belief in the existence of an immediate danger, no matter how unfounded that view, is conclusive. The management's only recourse against arbitrary and capricious decisions by the committee is to seek removal of the offending members. Circumvention of the procedures of § (e), including a formal vote by the committee members, thus removes the only deterrent to unreasonable action by the committee. Given this circumstance, one would not lightly assume that failure to follow the specific procedures outlined in § (e) is somehow *de minimis*. In any event, whether the union properly invoked this provision is a substantial question of contractual interpretation, and the collective-bargaining agreement explicitly commits to resolution by an impartial umpire all disagreements "as to the meaning and application of the provisions of this agreement."¹⁵

¹⁵ Respondents also argue that Paragraph 1 of the "Miscellaneous" section of the agreement disavows any intent to impose a no-strike duty. Paragraph 1 provides:

"1. Any and all provisions in either the Appalachian Joint Wage

The Court of Appeals majority also based its denial of injunctive relief on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, which provides in part:

"[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

This section provides a limited exception to an express or implied no-strike obligation. The Court of Appeals held that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract." 466 F. 2d, at 1160. We agree with the main thrust of this statement—that a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction.

The Court of Appeals majority erred, however, in con-

Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." App. 14a.

This paragraph effectively rescinds certain no-strike clauses in two prior agreements. It does not, however, purport to negate any no-strike duty created by the present agreement. As we have noted, the agreement makes arbitration the exclusive and compulsory means for finally resolving disputes. Under *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95 (1962), this arbitration provision gives rise to an implied no-strike duty. We do not think that Paragraph 1 can be fairly construed as an exception to that no-strike duty. Cf. *Lewis v. Benedict Coal Corp.*, 259 F. 2d 346 (CA6 1958) (Stewart, J.), affirmed by an equally divided Court, *sub nom. Mine Workers v. Benedict Coal Corp.*, 361 U. S. 459 (1960).

cluding that an honest belief, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of § 502. If the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers. As Judge Rosenn pointed out in his dissent from the judgment below, the difficulty occasioned by this view is especially apparent where, as here, the claim concerns not some identifiable, presently existing threat to the employees' safety, but rather a generalized doubt in the competence and integrity of company supervisors.¹⁶ Any employee who believes a supervisor or fellow worker incompetent and who honestly fears that at some future time he may commit some unspecified mistake creating a safety hazard could demand his colleague's discharge and walk off the job despite the contractual agreement not to do so. Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be. We agree with Judge Rosenn that a union seeking to justify a contractually prohibited work stoppage under

¹⁶ Judge Rosenn contended with justification that a wholly subjective test would open "new and hazardous avenues in labor relations for unrest and strikes." He stated:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.'" 466 F. 2d, at 1162.

§ 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." 466 F. 2d, at 1162. We find this reading of the statute consistent both with common sense and with its previous application. See, e. g., *Philadelphia Marine Trade Assn. v. NLRB*, 330 F. 2d 492 (CA3), cert. denied *sub nom. International Longshoremen's Assn. v. NLRB*, 379 U. S. 833 and 841 (1964); *NLRB v. Fruin-Colnon Construction Co.*, 330 F. 2d 885 (CA8 1964); *NLRB v. Knight Morley Corp.*, 251 F. 2d 753 (CA6 1957), cert. denied, 357 U. S. 927 (1958); *Redwing Carriers, Inc.*, 130 N. L. R. B. 1208 (1961), enf'd as modified, *sub nom. Teamsters Local 79 v. NLRB*, 117 U. S. App. D. C. 84, 325 F. 2d 1011 (1963), cert. denied, 377 U. S. 905 (1964).

IV

On the facts of this case, we think it clear that § 502 did not deprive the District Court of authority to enforce the contractual no-strike obligation. The union inferred from the foremen's failure to record the reduced airflow on the morning of April 15 that their return to the job created an abnormally dangerous working condition. One may doubt whether this assertion alone could suffice to invoke the special protection of § 502. In any event, the District Court resolved the issue by expressly conditioning injunctive relief on the suspension of the two foremen pending decision by the impartial umpire.

For similar reasons, it is also evident that injunctive relief was appropriate in the present case under the equitable principles set forth in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S., at 254. The District Court found that the union's continued breach of its no-strike obligation would cause irreparable harm to the petitioner. It eliminated any safety issue by suspending the two foremen pending a final arbitral decision.

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In these circumstances, we cannot say that the District Court abused its discretion.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I

The dispute in this labor case does not involve hourly wages, pension benefits, or the like. It involves the life and death of the workers in the most dangerous occupation in America.¹ The history of the coal miner is a history of fatal catastrophes, which have prompted special protective legislation.² Nor was the mine involved here an exception. It is classified by the United States Bureau of Mines as "especially hazardous," triggering special inspection procedures to insure the safety of the men who work it. Federal Coal Mine Health and Safety Act of 1969, § 103 (i), 83 Stat. 750, 30 U. S. C. § 813 (i). Congress has received testimony about safety problems at this mine in which the workers, a year before this dispute, complained of the supervisors' negligence in safety matters, particularly their practice of "not testing for gas."³ At those hearings Senator Harrison Williams, the principal author of the 1969 mine safety act, commented that the enforcement performance of the United States Bureau of Mines was "outrageous . . . just plain unbelievable."⁴

¹ Bureau of Labor Statistics, *Injury Rates by Industry*, 1970, pp. 3, 6 (Report No. 406, 1972).

² S. Rep. No. 91-411, pp. 3-6; H. R. Rep. No. 91-563, pp. 1-3.

³ Hearings on Health and Safety in the Coal Mines before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 27, 351 (1970).

⁴ *Id.*, at 191.

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It was in the context of this history that the workers discovered that three of their foremen had negligently failed to check and record the airflow in the mine before the daylight shift began, as was their duty. Instead they made false entries in their log books. As a result, they had not discovered that the airflow in the mine was 11,000 cubic feet per minute rather than the normal 28,000. Reduced airflow can result in a buildup of methane gas, creating conditions for accidental explosions resulting from the operation of normal mining equipment. The workers walked off the job and refused to return unless the foremen were removed. The majority passes off the workers' concern here as only "a generalized doubt in the competence and integrity of company supervisors" as if there were only unfounded fears about a few men in an operation with an exemplary safety record. Yet the foremen in question pleaded *nolo contendere* to state charges of falsifying the records involved in this incident, and their admitted misfeasance is precisely the kind of reckless disregard for the miners' safety which permeates the history of this industry.

In response to this history, the union obtained, in the collective-bargaining agreement in force during this incident, a provision for a union "mine safety committee" with the authority to present the mine operator with a binding "recommendation" that all workers be removed from an unsafe mine area. The agreement provides no recourse for the operator in disagreement with the committee's determinations, although he may subsequently seek removal from the committee of members he believes to have acted arbitrarily. Yet it is clear from this provision that the union reserved to itself the authority to determine that a mine be closed because of safety hazards. Although there is an explicit provision that a dispute over whether a committee member should be removed is arbitrable, there is no such provision for arbitration

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if the mine operator disagrees with the committee's recommendation. The inescapable inference, absent any contrary presumption, is that this question is not subject to arbitration.⁵ And in what clearly appears to be a buttress to the union's authority in this matter, all no-strike provisions from prior contracts were explicitly excluded from the agreement in question here, which contains no such commitment on the part of the union.

This is the contractual context in which the employer brought this action, under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, to compel arbitration of the safety dispute and enjoin the work stoppage. It is, of course, clearly established that because of congressional policy favoring arbitration of labor disputes, a general arbitration provision, as found in the agreement here in question, is broadly construed. *Steelworkers Trilogy* (*United Steelworkers of America v.*

⁵ This inference is strengthened by the agreement's provisions for arbitration if the operator objected to recommendations by federal coal mine inspectors. § (b)(2) of the agreement. There would obviously be no need for this special arbitration provision if the parties felt that safety questions could be handled through the regular arbitration machinery.

Indeed the provision in question here has a long history supporting this construction. The 1946 agreement, known as the Krug-Lewis agreement, and arising from President Truman's seizure of the mines in 1946, *United States v. United Mine Workers of America*, 330 U. S. 258, expressly permitted union safety committees to initiate safety stoppages, although the Federal Coal Mines Administrator (Capt. N. H. Collisson), was given authority to halt such a stoppage. At hearings following the Centralia mine disaster, resulting in the death of 111 miners, Secretary of the Interior Krug testified that the meaning of the provision "was to give the mine safety committee complete authority to get the men out of the mine, if they felt the mine was unsafe" Hearings pursuant to S. Res. 98 before a Special Subcommittee of the Senate Committee on Public Lands, 80th Cong., 1st Sess., 312. The predecessor to the current provision appeared in the National Bituminous Coal Wage Agreement of 1947, which deleted Collisson's authority to override the miners.

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American Mfg. Co., 363 U. S. 564; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593). This policy is grounded, as the majority points out, in the expression of policy by the Labor Management Relations Act. And once a dispute is determined to be arbitrable, there is an implied agreement by the union not to strike, *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95, which is enforceable by a federal court injunction under the principles enunciated in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235, because of the close relationship between the duty to arbitrate and the duty not to strike. *Lucas Flour, supra*, at 104-106; *Boys Markets, supra*, at 247-249.

Yet this whole scheme, grounded as it is on congressional expression of policy, must allow for any congressionally indicated exceptions to that policy. In a § 301 suit the federal courts are to apply federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456. Although the "presumption of arbitrability" might be sufficient in the ordinary case to overcome the contrary implications in the collective-bargaining agreement involved here, I find that presumption seriously weakened in the area of safety disputes by § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, which expressly shields walk-offs by workers concerned for their safety: That section reads in part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." Although there is nothing in the legislative history of this section to shed light on its purpose, the words of the section are themselves fairly clear. They recognize in the law what is in any case an unavoidable principle of

human behavior: self preservation. As Judge Hastie said for the majority in the Court of Appeals: "Men are not wont to submit matters of life or death to arbitration" 466 F. 2d 1157, 1160.

This is an area involving "the penumbra of express statutory mandates" to be solved "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Lincoln Mills, supra*, at 457. Although there is a general policy favoring arbitration, I do not find that Congress intended to extend that policy here. Application of the "presumption of arbitrability" is not inevitable in every labor dispute. But miners' determination to act to protect their own safety is as inevitable in labor disputes as elsewhere. Absent any presumption, I cannot find that the dispute here was arbitrable or that the union was under any duty not to strike. It follows then, as the Court of Appeals found, that there was no wrong to remedy.

II

Congress in 1969 set up pervasive administrative controls over working and environmental conditions with the coal mines,⁶ 83 Stat. 742. The need for a more effective regulatory scheme was described in House Report No. 91-563. The 1969 Act states in its findings and purpose that "the first priority and concern of all in the coal mining industry must be the health and safety of

⁶ The hazards to the health of workers of various working conditions have been of great concern to Congress, its latest Act being the Occupational Safety and Health Act of 1970, 84 Stat. 1590, which in terms does not exclude employees who are in the coal-mining business. The Act looks toward increasing the quality of the environment in which employees work and of improving the workmen's compensation system under which they are protected. See Brodeur, *Casualties of the Workplace*, *New Yorker*, Nov. 19, 1973, p. 87, for an account of the industrial-medical complex that works to keep plants profitable to the owners and dangerous to the workers.

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its most precious resource—the miner.” § 2 (a), 30 U. S. C. § 801 (a). Ease of investigating mines was insured. The Act provides that when a representative of the miners believes that a violation of a mandatory standard exists and an imminent danger exists, the right of immediate inspection is given the Federal Government. § 103 (g), 30 U. S. C. § 813 (g). The Secretary of the Interior may make a spot investigation of a mine for five working days when he believes hazardous conditions exist. § 103 (i), 30 U. S. C. § 813 (i). Once a hazardous condition is found the Secretary can order that all miners be evacuated from the area and prohibited from entering it. § 104 (a), 30 U. S. C. § 814 (a). The Secretary can abate mining in incipient or potential mining areas, § 105, 30 U. S. C. § 815; and his orders are within limits subject to judicial review by the miners as well as by the operators. § 106, 30 U. S. C. § 816.

Detailed ventilating requirements are placed in the Act, § 303, 30 U. S. C. § 863; and examinations of each mine must be made within “three hours immediately preceding the beginning of any shift.” § 303 (d)(1), 30 U. S. C. § 863 (d)(1). Examinations for hazardous conditions must be made at least once a week, § 303 (f), 30 U. S. C. § 863 (f); and weekly investigations of ventilating conditions must be made and various monitors which detect dangerous gases must be installed, § 303 (l), 30 U. S. C. § 863 (l). The regulatory scheme covers the subject matter in minute detail.

Penalties run against operators of mines and also against miners who violate in specified ways “mandatory safety standards.” Compensation of miners laid off by closed mines is provided, § 110 (a), 30 U. S. C. § 820 (a); and miners are protected against discharge or other discrimination by protests they have made against the operations by testimony they have given. § 110 (b), 30 U. S. C. § 820 (b).

Title IV of the Act treats disability payments and payments for the death of miners. It bolsters state workmen's compensation laws and makes the owners liable, through self insurance or through liability insurance, where an adequate state law does not exist, § 423, 30 U. S. C. § 933. State laws inconsistent with the federal act are suspended; but state laws which provide more stringent standards or controls survive, § 506, 30 U. S. C. § 955.

A close reading of this Act convinces me that it must displace all agreements to arbitrate safety conditions. It is in that respect a more extreme case than *U. S. Bulk Carriers v. Arguelles*, 400 U. S. 351, where we held that a federal statute giving seamen a specific judicial remedy was not displaced by arbitration. When it comes to health, safety of life, or determination of environmental conditions within the mines, Congress has pre-empted the field. An arbiter is no part of the paraphernalia described in the Act. An arbiter seeks a compromise, an adjustment, an accommodation. There is no mandate in arbitration to apply a specific law. Those named in the present Act who construe, apply, and formulate the law are the Secretary and the courts.

Moreover, arbitration awards might compromise administration of the 1969 Act. Rulings of arbiters might not jibe with rulings of the Secretary. Rulings of the arbiters might even color claims for compensation or damages by negating the very basis of liability under either workmen's compensation Acts or in state lawsuits for damages.

Hence, though I disagree with the way in which the Court reads this particular arbitration clause, I conclude that even though the collective-bargaining agreement is read to authorize arbitration, the 1969 Act precludes it. The 1969 Act specifies the arms of the law which handle these matters of safety of mines. Congress has given arbiters no share of the power.